EDITOR'S NOTE

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86-1642

No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY,
AND WEST PENN POWER COMPANY,
Petitioners,

v.

JOHN O. MARSH, JR.,
LIEUTENANT GENERAL JOHN W. MORRIS,
COLONEL MAX R. JANAIRO, JR.,
AND COLONEL JOSEPH A. YORE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether Congress intended the 1972 amendments to the Federal Water Pollution Control Act to repeal the exclusive authority over hydropower licensing entrusted by Congress since 1920 to the Federal Energy Regulatory Commission and its predecessor, and require specifically that hydropower licensing be subjected to duplicative, *de novo* proceedings by the Commission and by the United States Army Corps of Engineers?

2. Whether the Court of Appeals correctly held that the Federal Energy Regulatory Commission is not required to implement substantive environmental protections in discharging its obligation to issue hydropower licenses "in the public interest"?

CORPORATE LISTING STATEMENT

Petitioners Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company are wholly-owned subsidiaries of Allegheny Power System, Inc. Affiliates of petitioners include Allegheny Power Service Corporation, Allegheny Generating Company, Allegheny Pittsburgh Coal Company, West Virginia Power and Transmission Company, West Penn West Virginia Water Power Company, Ohio Valley Electric Company and Indiana Kentucky Electric Company.

PARTIES

In addition to the parties listed in the caption, the Federal Energy Regulatory Commission intervened as an appellee in the Court of Appeals and sought to have the District Court's decision affirmed. Also, the following parties intervened as defendants in the District Court and sought to have its decision reversed in the Court of Appeals: the Sierra Club, West Virginia Highlands Conservancy, National Wildlife Federation, Environmental Defense Fund, National Audubon Society and the State of West Virginia.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of Circuit Judge Spottswood W. Robinson, III, for the Court of Appeals, joined by Senior District Court Judge Oliver Gasch, sitting by designation (Senior Circuit Judge David L. Bazelon heard argument but did not participate in consideration of the opinion), is reported at 809 F.2d 41 (D.C. Cir. 1987), and a copy thereof is reprinted as Appendix

A. The Memorandum and Order of District Judge John Lewis Smith, Jr., for the District Court is reported at 507 F.Supp. 385 (D.D.C. 1980), *sub nom.*, *Monongahela Power Company* v. *Alexander*, and a copy thereof is reprinted as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1987. A timely suggestion for rehearing *en banc* was denied on March 24, 1987 (by a vote of 7 to 4). *See* Appendix C. An uncontested motion to stay issuance of the mandate was granted by the Court of Appeals on March 24, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

The statutes involved are: Sections 4(e), 10(a), and 23(b) of the Federal Power Act, 16 U.S.C. §§ 797(e), 803(a), and 817; and Sections 301(a) and 404(a) of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(a) and 1344(a). The full text of these statutory provisions is set forth in Appendix D.

STATEMENT OF THE CASE

The Court of Appeals has decided that Congress, by enacting the Federal Water Pollution Control Act ("FWPCA") Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972), repealed by implication the exclusive authority for licensing of America's hydropower resources entrusted by Congress since 1920 to the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission ("FPC"). In the exercise of that exclusive jurisdiction the FPC,

based upon a seven-year proceeding in which the United States Army Corps of Engineers ("Corps") participated and raised no objection, issued a license for the construction and operation of a hydroelectric power project to be owned and operated by petitioners. Thereafter, the Corps promulgated regulations purporting to make the project subject to its authority to issue dredge and fill permits under Section 404(a) of the FWPCA, as added by the 1972 amendments. Following a brief, informal review, the Corps then refused to issue the permit, thus vetoing the FPC license.

Petitioners filed suit in the United States District Court for the District of Columbia. On cross-motions for summary judgment, the District Court upheld the exclusive jurisdiction of the FPC, concluding that the Corps has no jurisdiction over projects licensed by the FPC pursuant to the Federal Power Act. Six years after appeal to the United States Court of Appeals for the District of Columbia Circuit and ten years after issuance of the FPC license, the Court of Appeals reversed the District Court, holding that the Corps has not only jurisdiction over the licensing of hydropower projects but in effect a veto power over FPC licenses by refusing issuance of dredge and fill permits under Section 404(a). This decision directly derogates Section 10 of the Federal Power Act, which gives the Commission "comprehensive" licensing authority, and terminates sixty-seven years of exclusive FPC jurisdiction.

Believing that this decision profoundly misconstrues the relationship between two major and longstanding legislative schemes and impermissibly weakens one of

them, petitioners seek review of the Court of Appeals' decision through a writ of certiorari.

1. Proceedings Before the Commission

More than sixteen years ago, on June 3, 1970, petitioners applied to the then-Federal Power Commission[1] pursuant to Sections 4(e), 10(a), and 23(b) of the Federal Power Act, 16 U.S.C. §§ 797(e), 803(a), and 817, for a 50-year license to construct and operate a 1,000 megawatt hydroelectric generating facility in Tucker County, West Virginia. This facility, known as the "Davis Project," is designed to produce electric power through "pumped storage"—a technology in which water is pumped from a lower reservoir to an upper reservoir during off-peak periods using energy derived from power plants otherwise idling at those times of low demand for electricity. The water is then returned through turbine generators when the demand for electricity is greatest. Construction of the Davis Project would involve the erection of a dam and embankments to impound water for the two reservoirs on private property owned by petitioners. In conjunction with the project, petitioners also propose to establish an extensive (over thirteen thousand acres) wildlife and natural resources preserve in the area of the project, a region which is privately owned and open to development. That preserve would protect over four thousand acres of wetlands.

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[1] The Federal Power Commission was redesignated the Federal Energy Regulatory Commission in the 1977 Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977). The two bodies are hereinafter referred to collectively as the "Commission."

The Commission made a thorough analysis of petitioners' proposed project over more than seven years, conducting a series of public hearings on the record before an administrative law judge. The Commission made changes in the project and imposed a large number of substantive requirements. Among other things, the Commission considered the structural feasibility and geological soundness of the Davis Project, the need for the energy to be generated by the facility, its impact upon the environment—particularly upon the affected wetlands areas, numerous alternatives to the proposed project, recreational opportunities arising from the lake that would be formed by the lower reservoir, and a vast wildlife and natural resources preserve proposed to be established in part as "mitigation" for the property to be utilized. *See Monongahela Power Co.*, 58 F.P.C. 451 (1977). The Commission received evidence and comment from a number of parties and interests, including the United States Department of the Interior, the West Virginia Department of Natural Resources, and the Corps itself, which submitted three sets of comments.

The most intensely explored subject during the Commission's seven-year review was the effect that the project and its alternatives would have on the environment. As the administrative law judge concluded:

> The 40 volumes of the hearing transcript deal mainly with the environmental issues raised by the parties. [The FPC] Staff has presented for cross-examination about 15 witnesses who participated in, or contributed material for, the preparation of the [Final

> Environmental Impact Statement]; and it has, in addition, sponsored the testimony of about 10 other expert witnesses, such as those from [the West Virginia Department of Natural Resources] and the U.S. Department of Interior. All parties have been afforded ample opportunity to adduce any and all facts relating to the environmental effects of the project and the alternatives thereto.

58 F.P.C. at 534; *see* J.A. 208.[2] The Corps participated in the Commission's licensing proceeding and in its written comments concerning the project's environmental, navigational, and flood control effects raised no objections. *See* J.A. 81-82, 86-87 and 90.

On April 21, 1977, the FPC issued a forty-four page decision approving the Davis Project and granting to petitioners a 50-year license to build and operate it. The Commission concluded that issuance of a license under the stated terms and conditions "is and will be necessary and desirable in the public interest." 58 F.P.C. at 474.

Some of the intervenors in the FPC proceeding filed petitions for review of the FPC license decision in the United States Court of Appeals for the District of Columbia Circuit pursuant to 16 U.S.C. § 825*l*. Those petitions were consolidated and from 1977 to this day have been awaiting disposition, held in abeyance by the Court of Appeals pending resolution of the question involved in the instant case. *See* App. A at A-4 n.10.

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[2] The term "J.A." refers to the Joint Appendix filed in the Court of Appeals.

2. Proceedings Before The Corps

On July 19, 1977, three months after the Commission issued a license for the Davis Project, the Corps promulgated regulations pursuant to Sections 301(a) and 404(a) of the FWPCA, 33 U.S.C. §§ 1311(a) and 1344(a), purporting for the first time to assert jurisdiction over the project. *See* 42 Fed. Reg. 37146 (1977) (later codified at 33 C.F.R. § 323.3(e)(1982)). Petitioners were required under the terms of the new Corps regulations to obtain a Section 404 "dredge and fill" permit for the project dam before construction of the project could begin; the comprehensive seven-year review of the Davis Project by the FPC and the award of a valid license under the Federal Power Act were irrelevant so far as the Corps was concerned.

Though disputing the Corps' jurisdiction over Commission-licensed projects, petitioners complied with the published regulations in order, they believed, to expedite construction of the licensed project. After the filing by petitioners of a permit application on January 23, 1978, the Corps conducted a brief, informal review, including two "town hall" public hearings with no opportunity for examination or questioning of those making statements. The Corps adopted without revision the Final Environmental Impact Statement prepared by the Commission. J.A. 336-440, and 448.

The Corps, despite its own participation in the Commission's proceeding, denied petitioners' application on July 14, 1978. It cited the impact of the Davis Project on wetlands areas as the key factor in denying the Section 404 permit, but employed no test and addressed no facts that varied in any significant way from the Commission's analysis. *Compare* J.A. 693

(the Corps' decision) *with* J.A. 242-46 and 263 (the Commission's decision).

3. The District Court Proceeding

Petitioners filed this lawsuit on September 12, 1978 in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief that would permit construction of the Davis Project in accordance with the valid Commission license. Petitioners' primary argument was that the Corps was without jurisdiction over the project because Congress had vested exclusive jurisdiction over hydropower projects in the Commission.

The District Court (Judge John Lewis Smith, Jr.) entered judgment for petitioners on December 19, 1980, holding that the Federal Power Act conferred exclusive federal jurisdiction over hydropower projects upon the Commission, and that the Corps was thus without statutory authority to require that the Davis Project obtain a permit under Section 404(a) of the FWPCA. *See* App. B. The District Court's decision was premised upon considerations of legislative intent and upon its conclusion that the FWPCA could not, consistent with principles of statutory construction laid down by this Court, be considered to have repealed by implication the exclusive licensing authority exercised by the Commission under the Federal Power Act.

4. The Court of Appeals Proceeding

Appeals were taken. More than four and one-half years after oral argument before the United States Court of Appeals for the District of Columbia Circuit on June 18, 1982, a two-judge panel of the Court of

Appeals reversed the District Court's judgment.[3] *See* App. A. The Court of Appeals presumed that the FWPCA applied to the construction of hydropower projects and did not consider the resultant elimination of the Commission's exclusive jurisdiction to be inconsistent with legislative intent or to constitute a repeal by implication of the Federal Power Act's exclusive single-agency hydropower licensing scheme. To avoid the difficulties attendant to its creation of overlapping jurisdictional roles for the Commission and the Corps, the Court of Appeals interpreted the Federal Power Act as not imposing upon the Commission a substantive obligation to consider environmental concerns in its licensing decisions.

Petitioners' Suggestion For Rehearing *En Banc* was denied on March 24, 1987. *See* App. C. Circuit Judges Robert H. Bork, Laurence H. Silberman, Stephen F. Williams, and Douglas H. Ginsburg voted in favor of rehearing.

REASONS FOR GRANTING THE WRIT

This case presents questions of exceptional importance to implementation of the nation's laws, and to the way in which courts must interpret major legislative enactments in order to effectuate congressional intent. Specifically at issue in this case are two comprehensive and longstanding programs created by Congress—one governing the licensing of hydropower projects through a centralized single-agency licensing

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[3] Senior District Judge Oliver Gasch of the District of Columbia, sitting by designation, joined in Judge Robinson's opinion. Senior Circuit Judge Bazelon heard argument on the appeal but retired before the panel's opinion was issued and did not participate in its consideration.

process requiring that the Commission evaluate all factors relevant to the public interest, specifically including environmental aspects; the other controlling water pollution from dredge and fill operations through a multi-agency program. The programs, and the policies which they were created to promote, are compatible with one another and complementary.

The Court of Appeals, however, erroneously considered centralized hydropower project licensing to be inconsistent with protection of the environment. To resolve this perceived conflict, it conferred upon itself the authority to effect two major amendments to the Federal Power Act. First, it dismantled the exclusive licensing authority exercised by the Commission since 1920, giving concurrent jurisdiction—and veto power—over hydropower projects to the Corps. But this purported solution produced a new problem, as its effect is to subject hydropower projects to duplicative, *de novo*, nonbinding one-on-the-other environmental reviews by the Commission pursuant to Section 10(a) of the Federal Power Act and by the Corps pursuant to Section 404(a) of the FWPCA. Recognizing that such concurrent environmental responsibility is untenable, the Court of Appeals then emasculated the Federal Power Act yet again, inexplicably stripping the Commission of its established and substantive environmental role in order to avoid any potential duplication of the Corps' permit process.

These actions, by the Court of Appeals' own statement devoid of express legislative support, are contrary both to consistently-expressed congressional intent and to decisions of this Court in every area of the law involved. The Commission's exclusive jurisdiction over hydropower project licensing has been

reaffirmed twice by Congress since passage of the FWPCA Amendments of 1972. And the Commission's statutory obligation to implement environmental protections in licensing decisions has been confirmed by this Court and by the Commission's own published actions, and as recently as last year was confirmed by Congress.

The Court of Appeals' decision has dramatically altered the program prescribed by Congress for hydropower project licensing, and upset the statutory balance between two agencies charged with administration of legislative schemes designed to implement important national policies. It is the product not only of a failure to abide by legislative intent, but of a theory of statutory interpretation prohibited in a consistent line of this Court's decisions. To correct these significant and far-reaching errors and to see that the nation's laws are properly effectuated, the writ of certiorari sought by petitioners should be granted.

I.

ELIMINATION OF THE COMMISSION'S EXCLUSIVE JURISDICTION OVER HYDROPOWER PROJECT LICENSING IS CONTRARY TO CONGRESSIONAL INTENT AND IN CONFLICT WITH BINDING PRECEDENT

To understand the significance of the Court of Appeals' jurisdictional holding, it is necessary first to appreciate Congress' substantial and continuing commitment to the consolidation of all federal hydropower licensing authority in a single agency. Prior to 1920, federal authority over the licensing of hydropower projects was scattered among the Departments of

War, Interior, and Agriculture.[4] There was widespread dissatisfaction with the resulting jurisdictional and policy disputes, and a widely supported effort, led by conservationists, was launched to reformulate the hydropower licensing process. *See First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U.S. 152, 180 (1946). Congress responded in 1920 by passing the Federal Water Power Act,[5] a statute whose express purpose was to create the Federal Power Commission and to consolidate in that body all federal hydropower licensing authority to the fullest extent permitted by the Commerce Clause. *Id.* at 180-81; *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, 107 (1965).

In the sixty-seven years since passage of the Federal Power Act, Congress has never altered the Commission's sole jurisdiction over hydropower projects or given any other indication that the exclusiveness of the regulatory scheme has been or should be altered. Indeed, all expressions of congressional intent have been to the contrary. For example, when transferring the FPC's functions to the Federal Energy Regulatory Commission ("FERC") through the De-

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[4] The Secretary of War acting through the Corps of Engineers had authority under the Rivers and Harbors Act of 1899, 30 Stat. 1121 (1899). The Secretary of Agriculture had authority over certain hydroelectric projects under the Act of February 1, 1905, 33 Stat. 628 (1905), and the Secretary of Interior had authority over projects built on lands under his control. J. Kerwin, *Federal Water-Power Legislation* at 105-114.

[5] The name of the Federal Water Power Act was changed to the Federal Power Act in 1935 to reflect the expanded duties of the FPC under Title II of the Public Utility Act of 1935, 49 Stat. 838 (1935).

partment of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977), the licensing of hydropower projects was described expressly as within the agency's "exclusive jurisdiction." H.R. Conf. Rep. No. 539, 95th Cong., 1st Sess. 55, 75, *reprinted in* 1977 U.S. Code Cong. & Admin. News 925, 946.

The Court of Appeals acknowledged that Congress had given the Commission "exclusive jurisdiction" over hydropower projects as described in the 1977 Conference Report but, through reference to a novel distinction between "vertical" and "horizontal" authority, transformed "exclusive jurisdiction" into "coordinate jurisdiction" with the Corps of Engineers, one of the very same agencies eliminated by Congress in 1920 from any licensing role. *See* App. A at A-14. The 1977 Conference Report, however, does not leave room for so implausible an interpretation: the Commission's "exclusive jurisdiction consists of functions . . . within the sole responsibility of the Commission to consider and to take final agency action on without further review by the Secretary [of Energy] *or any other executive branch official.*" H.R. Conf. Rep. No. 539, *supra*, at 75, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 946 (emphasis added).

Just last year, Congress enacted the Electric Consumers Protection Act of 1986 ("ECPA"), Pub. L. No. 99-495, 100 Stat. 1243 (1986), a statute which amended the Federal Power Act in part specifically to emphasize that the Commission is to give "equal consideration" to the concerns of environmental quality, including the preservation and enhancement of fish and wildlife, in licensing decisions. *Id. at* § 3(a),

100 Stat. at 1243 (1986) (amending Section 4(e) of the Federal Power Act).[6] ECPA is an express reaffirmation of Congress' view of the Federal Power Act as the statute governing the environmental requirements for hydropower projects, and its reliance upon the Commission as the administrative body with sole responsibility for review of such matters.

The Court of Appeals did not refer to or discuss ECPA in its opinion.

The Court of Appeals conceded that there is nowhere to be found in sixty-seven years of legislative history any statement of congressional intent to dismantle the Commission's exclusive jurisdiction over hydropower projects. *See* App. A at A-17 - A-18. Rather, the court's decision was based exclusively upon speculation that the FWPCA Amendments of 1972 and a subsequent amendment, the Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566 (1977), must have been intended, without any Congressional statement to that effect, to achieve that purpose. No provision of the FWPCA amendments of 1972 or 1977 expressly effects such a dramatic change in the established hydropower licensing scheme, however. Nor is such a change necessary. The Court of Appeals could not cite any legislative history even reflecting a suggestion that the water pollution control legislation was intended to apply to hydropower projects that had already been subjected to a thorough federal

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[6] Sections 3(b) and (c) of ECPA also strengthen the Commission's environmental role, in part by adding a new subsection 10(j) to the Federal Power Act which requires increased consideration of recommendations made by federal and state agencies pursuant to the Fish and Wildlife Coordination Act, Pub. L. No. 85-624, 72 Stat. 563 (1958).

review and that had never previously required any federal approval other than a license from the Commission.

The Court of Appeals' naked presumption that Section 404(a) "would seem" to apply to Commission-licensed projects, App. A at A-11, is one that cannot be allowed to stand in this case given the lack of direct or indirect legislative support. *See Train* v. *Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1 (1976). Indeed, the legislative history indicates the contrary view that Congress never intended Section 404(a) to apply to hydropower projects historically within the Commission's exclusive jurisdiction. In the face of a general transfer of Corps authority to the Environmental Protection Agency, Section 404, which was added by Senator Ellender as a floor amendment,[7] was intended merely to preserve some of the Corps' former jurisdiction, not expand it:

> Mr. President, this is a very simple amendment, and should not take long to explain.
>
> It simply *retains* the authority of the Secretary of the Army to issue permits for the disposal of dredged materials. This is essential since the Secretary of the Army is re-

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[7] The text of Section 404 was originally adopted by the Senate as an amendment to Section 402 of S. 2770. 117 Cong. Rec. S38857 (1971). It appeared as a separate section when considered by the House as H.R. 11896, 118 Cong. Rec. H10804 (1972), and was enacted into law in that form. 118 Cong. Rec. H33718 (1972).

This Court has specifically looked to statements made during debate over Section 404 as a guide to determining the legislative intent of the provision. *See Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 14-15 and 19-20 (1976).

> sponsible for maintaining and improving the navigable waters of the United States.

117 Cong. Rec. S38853 (1971) (statement of Senator Ellender) (emphasis added). And what was "retained" was authority that, prior to 1972, did not extend to privately built Commission-licensed hydropower projects or the power to veto Commission licenses. As regulations promulgated by the agency in 1968 stated:

> . . . the functions of the Chief of Engineers and the Secretary of the Army to authorize non-Federal water power projects or modifications of existing pre-1920 non-Federal water power projects were transferred to the Federal Power Commission by the Federal Water Power Act of 1920 (41 Stat. 1063).

33 Fed. Reg. 18672 (1968) (later codified at 33 C.F.R. § 209.120(d)(9) (1972)). The Corps' initial interpretation of Section 404(a) following the 1972 FWPCA amendments was also one which did not apply the permit requirement to Commission-licensed projects. *See Scenic Hudson Preservation Conference* v. *Callaway*, 370 F.Supp. 162, 164 (S.D.N.Y. 1973), *aff'd per curiam on district court opinion*, 499 F.2d 127 (2d Cir. 1974).

It is thus incorrect to assume, as does the Court of Appeals, that Congress intended Section 404(a) to impose upon the Corps the unprecedented responsibility for approval of Commission-licensed hydropower projects.

The Court of Appeals also considered the 1977 amendments to the FWPCA, and the fact that Commission-licensed projects were not among a number of stated exemptions from the licensing requirement

of Section 404(a). *See* App. A at A-19 - A-21. The court presumed from this omission an affirmative expression of congressional intent to repeal the Federal Power Act's scheme of exclusive licensing authority. *Id.* at A-24. This ignores the fact that no exemption would be necessary or expected because Congress never intended in its 1972 enactment that the FWPCA affect Commission-licensed projects. Similarly, it fails to give effect to the contemporaneous and express congressional confirmation of the Commission's exclusive jurisdiction over hydropower licensing in the 1977 Department of Energy Organization Act. *See supra* pp. 12-13.

The fundamental error made by the Court of Appeals was its presumption that a Section 404(a) permit is necessary to implement national environmental policy—that in the absence of the Corps, hydropower projects would remain environmentally unregulated and capable of subverting environmental standards. Congress has specifically and consistently provided otherwise, since 1920 subjecting the construction and operation of hydropower projects to a thorough independent review covering all matters that might affect the public interest. Environmental protection has historically been part of that public interest, and its implementation by the Commission in its exercise of exclusive jurisdiction has grown with evolving national policy. *See infra* pp. 21 *et seq.*

The Court of Appeals' errors thus are not merely those of failing to heed congressional intent. The more basic flaw is manifested in the court's approach to reconciling major statutory schemes of the kind at issue in this case. Under settled principles of statutory

construction, in the absence of an irreconcilable conflict a court's role is to give maximum possible effect to all statutes at issue. *See Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 468 (1982); *Watt* v. *Alaska*, 451 U.S. 259, 266-67 (1981); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *United States* v. *Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985) (Scalia, J.), *cert. denied*, 106 S.Ct. 1262 (1986); *see, e.g., Appalachian Power Co.* v. *United States*, 607 F.2d 935, 941 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 935 (1980). Precisely that objective can be achieved in this case by recognizing both the Commission's exclusive jurisdiction over hydropower projects and its statutory, regulatory, and judicial obligation to implement national environmental protection policies in its licensing decisions.

The Court of Appeals purported to give "appropriate effect to both statutory provisions" in this case. App. A at A-25 n.116. But by abolishing the Commission's sole jurisdiction in order to extend application of the FWPCA, the Court of Appeals compromised an utterly central purpose of the Federal Power Act and thus failed to discharge its duty under the governing precedent. What the Court of Appeals actually effected was a repeal of the Federal Power Act by implication, an action unsupportable in the absence of a direct expression of legislative intent to repeal the scheme of exclusive jurisdiction.[8]

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[8] The same error was committed by the district court in *Scenic Hudson Preservation Conference* v. *Callaway*, 370 F.Supp. 162 (S.D.N.Y. 1973), *aff'd per curiam on district court opinion*, 499 F.2d 127 (2d Cir. 1974), a case decided before many of this Court's recent opinions enunciating the proper standard for re-

A nearly identical statutory question was addressed by this Court in *Train* v. *Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1 (1976), which held that the FWPCA did not repeal the exclusive authority of the Atomic Energy Commission ("AEC") over the disposition of certain radioactive materials. What mattered to this Court there—as should matter here—was a preexisting regulatory scheme reflecting the need to avoid inevitable multi-agency disputes and the absence of the "clear indication of legislative intent that we might expect before recognizing such a change in policy." *Id.* at 24.

The Court of Appeals' cursory dismissal of *Train* hinges on a statement in the legislative history of the FWPCA suggesting that materials regulated under the Atomic Energy Act of 1954 ("AEA"), Pub. L. No. 68-703, 68 Stat. 919 (1954), were not intended to be covered, and the Court of Appeals' assertion here that the legislative history offers no guidance as to the question presented in this case. *See* App. A at A-15. This assertion, however, is simply not correct. *See supra* pp. 14-16. More important, the Court of Appeals ignores this Court's direction in *Train* as to the way in which the AEA and the FWPCA are to be reconciled. That analysis, and its applicability to this case, are clear: The AEA established a "pervasive

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conciling statutory schemes. *See Monongahela Power Co.* v. *Alexander*, App. B at B-7 - B-9. The district court in *Scenic Hudson* posits its conclusion, just as does the Court of Appeals here, on the totally erroneous statement that the Commission's compliance with environmental requirements would be voluntary, not mandatory. 370 F.Supp. at 170; App. A at A-24. *Scenic Hudson*, moreover, was decided prior to and did not have the benefit of Congress' expressions of intent in the Department of Energy Organization Act and ECPA.

regulatory scheme" which cannot be repealed absent a "clear indication of legislative intent." 426 U.S. at 24. At least as strong a "clear indication of legislative intent" would have to be shown in this case, given the even more comprehensive authority the Commission enjoys compared to the AEC. *See Pacific Legal Foundation* v. *State Energy Resources Conservation & Development Comm'n*, 659 F.2d 903, 927-28 n.39 (9th Cir. 1981), *aff'd*, 461 U.S. 190 (1983).

In the absence of any statutory language or legislative intent of a congressional decision to reformulate the Commission's jurisdiction, the Court of Appeals' decision is clearly at odds with *Train*. It is, moreover, a precedent pursuant to which federal courts could freely rewrite legislation under the guise of "reconciling" it with other statutes that are not actually in conflict. A recent decision by the United States District Court for the Western District of Michigan, *National Wildlife Federation* v. *Consumers Power Co.*, No. G85-1146 (W.D. Mich. March 31, 1987), illustrates what can happen if courts are freed from *Train* by the Court of Appeals' decision in this case. The district court in the Michigan case, while acknowledging that there "may be strong policy arguments for allowing the FERC to exercise exclusive jurisdiction," proceeded, without any analysis or discussion, citing the Court of Appeals' decision here and *Scenic Hudson*, to deny the Commission's exclusive jurisdiction over the environmental question of the discharge of fish through the turbines of a Commission-licensed hydroelectric facility. *Id.*, slip op. at 16.

II.

THE COURT OF APPEALS' ATTEMPT TO STRIP THE COMMISSION OF ITS ENVIRONMENTAL ROLE IGNORES STATUTORY COMMANDS AND CONTRAVENES THIS COURT'S GOVERNING PRECEDENT

The Court of Appeals' conclusion that the Corps has licensing jurisdiction over hydropower projects under Section 404(a) of the FWPCA confronted that court with the specter of two different agencies conducting duplicative *de novo* environmental reviews that were not binding on each other. As the Court of Appeals acknowledged, however, the statutory scheme could not be interpreted to require the same facts about the same project to be used in the same inquiry by two different agencies. App. A at A-21 - A-22; *see Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186 (1968). This was a dilemma of its own making, and the Court of Appeals sought to escape from it by emasculating the Federal Power Act in a second way. What the court did was to announce that the Commission has no substantive environmental role in the issuance of hydropower project licenses, and to conclude as a consequence that no conflict exists between the Commission's review and the environmental review to be undertaken by the Corps in its permit proceedings.

This conclusion ends in one stroke the crucial and substantial environmental role that has been developed under the Federal Power Act by sixty-seven years of legislative, regulatory, and judicial action. Critical to the development of this role was this

Court's decision in *Udall* v. *Federal Power Commission*, 387 U.S. 428 (1967), a case interpreting the Commission's duty under Section 10(a) of the Federal Power Act to issue licenses "in the public interest." *Id.* at 450. This Court held in *Udall* that the statutory "public interest" requirement must be satisfied with reference to the contemporary national environmental policies established by federal laws.[9] *Id.* at 437-444; *see also NAACP* v. *Federal Power Commission*, 425 U.S. 662, 669-70 (1976); *Appalachian Power Co.* v. *United States*, 607 F.2d 935, 941 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 935 (1980). The FWPCA is itself precisely such a federal law whose policies are required to be implemented by the Commission through operation of the Federal Power Act.

Inexplicably, the Court of Appeals implicitly dismisses the teaching of *Udall* as establishing "the mere existence of an implied general obligation on [the Commission's] part to consider conservation factors in its deliberations." App. A at A-24.[10] The obligation is not "mere" or "implied" or "general," but an "explicit mandate" to ensure the "preservation . . . of water resources." *See NAACP* v. *Federal Power Commission*, 520 F.2d 432, 441-42 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976); *see also Public Service Comm'n*

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[9] At issue in the case were the Fish and Wildlife Coordination Act, Pub. L. No. 85-624, 72 Stat. 563 (1958) (current version at 16 U.S.C. §§ 661 *et seq.*), and the Anadromous Fish Act, Pub. L. No. 89-304, 79 Stat. 1125 (1965) (current version at 16 U.S.C. §§ 757a-757f (1982)).

[10] The Court of Appeals' only mention of *Udall* is a reference to the fact that the District Court had relied upon it. *See* App. A at A-23 n.105.

of New York v. *Federal Energy Regulatory Commission*, 589 F.2d 542, 558 (D.C. Cir. 1978) (Leventhal, J.). As recently as last year Congress reaffirmed the role of environmental factors in Commission licensing with the passage of ECPA. While expressly endorsing *Udall*, the Conference Report accompanying ECPA makes clear that Congress intended to enhance even further the environmental safeguards imposed by the Commission in licensing hydropower projects. H.R. Conf. Rep. No. 934, 99th Cong., 2d Sess. at 21-22, *reprinted in* 1986 U.S. Code Cong. & Admin. News 2496, 2507-10. No interpretation of the Federal Power Act that disavows the Commission's clear and essential environmental role can possibly be consistent with these legislative commands or be made in the name of environmental protection.

In addition to the Federal Power Act statutory provisions, the Commission's own regulations and decisions give effect to *Udall* and further establish the legitimacy and scope of its environmental function. The agency has expressly declared its "authority" to implement the policies of the FWPCA as incorporated into Section 10(a) of the Federal Power Act, as well as its authority under the Federal Power Act to impose stricter environmental requirements than those specified under other federal environmental laws. *Sierra Club* v. *Nebraska Pub. Power District*, 55 F.P.C. 3048, 3058 (1976); *South Carolina Electric & Gas Co.*, 7 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,180 at 61,339 (May 21, 1979). The Commission has, moreover, committed itself to adhere to the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1982), *see* 18 C.F.R. § 2.81 (1986), and has published guidelines for the submission of a compre-

hensive environmental analysis by applicants proposing major projects. *See* 18 C.F.R. pt. 2, App. A (1986). These guidelines, denigrated by the Court of Appeals as "precatory invitations for information," App. A at A-24, are in fact mandatory and, indeed, subject to supplementation at the discretion of the Commission staff. *See* 18 C.F.R. § 2.81(a)(1)(i) and pt. 2, App. A Preamble Para. 8 (1986).

There is no better reflection of the Commission's environmental obligation than the record of its performance in the very case before this Court.[11] Indeed, the most intensely explored subject during the Commission's seven-year review, much of it conducted through hearings on the record before an administrative law judge (40 volumes of testimony totalling 5,252 pages, with 138 exhibits), was the effect that the project or its alternatives would have on the environment. *See supra* pp. 5-6. The Corps participated in the Commission's licensing proceeding, submitting three sets of written comments concerning the project's environmental, navigational, and flood control effects. *Id.* at 6.

In contrast to the Commission's extensive, thorough environmental analysis, the Corps then conducted its own informal and brief environmental review, relying upon much of the same evidence and applying the

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[11] Although the Court of Appeals suggests in a footnote that the Commission did not actually subject petitioners' license application to "scrutiny" comparable to that which the Corps undertook, App. A at A-22 n. 100, the court made no analysis whatsoever of the factual record in the case. In fact, the Court of Appeals drew no conclusions about the level of environmental scrutiny performed by either the Commission or the Corps.

same statutory policies, but reaching a contrary result.

The Commission has a statutory, regulatory, and judicially-enforced mandate to implement the federal environmental laws, and has an essential role in national enforcement of environmental policy. The Court of Appeals' wholesale dismissal of that obligation poses a clear and palpable threat to the operation of the Federal Power Act. More generally, the approach employed by the Court of Appeals threatens the effective implementation of any federal law, environmental or otherwise, particularly those implemented by agencies charged to act "in the public interest". This Court must reestablish the environmental role of the Commission under the Federal Power Act and in so doing, reestablish the proper approach to be taken by reviewing courts in interpreting federal legislation.

III.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

April 13, 1987

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1201

MONONGAHELA POWER COMPANY, *et al.*
v.

JOHN O. MARSH, JR.,
Secretary, Department of the Army, *et al.*,
APPELLANTS,
FEDERAL ENERGY REGULATORY COMMISSION,
INTERVENOR.

No. 81-1203

MONONGAHELA POWER COMPANY, *et al.*
v.

JOHN O. MARSH, JR.
Secretary, Department of the Army, *et al.*,
THE SIERRA CLUB, *et al.*,
APPELLANTS,
FEDERAL ENERGY REGULATORY COMMISSION,
INTERVENOR.

No. 81-1282

MONONGAHELA POWER COMPANY, *et al.*
v.
JOHN O. MARSH, JR.,
STATE OF WEST VIRGINIA,
APPELLANT,
FEDERAL ENERGY REGULATORY COMMISSION,
INTERVENOR.

Appeals from the United States District Court for the District of Columbia

(Civil Action No. 78-01712)

Argued June 18, 1982

Decided January 13, 1987

Before ROBINSON, *Circuit Judge*, BAZELON, *Senior Circuit Judge*,* and GASCH,** *Senior District Judge.*

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: The Federal Water Pollution Control Act Amendments of 1972,[1] in Section 301(a), make generally unlawful the discharge of any pollutant into the navigable waters of the United States.[2] This legislation,

* *Senior Circuit Judge* BAZELON did not participate in the consideration of this opinion.

** Of the United Stated District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

[1] Pub. L. No. 92-500, 86 Stat. 816 (1972) (principally codified as amended at scattered sections of 33 U.S.C. (1982)) [hereinafter cited as codified].

[2] "Except as in compliance with [designated sections of the Act], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (1982).

however, in Section 404(a), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites.[3] The single issue posed by these consolidated appeals is whether a permit is required to discharge fill material into navigable waters during construction of a hydroelectric facility previously licensed by the Federal Power Commission (FPC).[4] The District Court answered that question in the negative.[5] We disagree.

I

Monongahela Power Company, on behalf of Allegheny Power System, Inc., applied to FPC for a license to construct a 1000-megawatt pumped-storage hydroelectric facility on the Blackwater River in the Canaan Valley of Tucker County, West Virginia.[6] This project contemplates erection of two dams creating two reservoirs, which would inundate more than 7,000 acres of freshwater wetlands.[7]

An initial decision by an administrative law judge denied the application, finding that the project would devastate the wetlands as a unique and diverse botanical and wildlife

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[3] Id. § 1344(a) (1982).

[4] Section 402(a)(1)(A) of the Department of Energy Organization Act of 1977, Pub. L. No. 95-91, 91 Stat. 565, 583 (codified at 42 U.S.C. 7172(a)(1)(A) (1982)), transferred FPC authority over the issuance and renewal of hydroelectric licenses to the Federal Energy Regulatory Commission (FERC). See text *infra* at notes 66-67.

[5] *Monongahela Power Co. v. Alexander*, 507 F. Supp. 385 (D.D.C. 1980).

[6] *Monongahela Power Co.*, Project No. 2709 (F.P.C. June 10, 1976) at 2, Joint Appendix (J. App.) 159 (administrative law judge's initial decision).

[7] *Id.* at 25, J. App. 182.

habitat.[8] FPC, however, concluded that these admitted losses, though substantial, could be mitigated,[9] and accordingly issued the license.[10]

The project's sponsors, with the Commission's license in hand, then applied to the Army Corps of Engineers for a Section 404(a) permit authorizing them to discharge fill material into navigable waters in the course of construction of the planned hydroelectric facility.[11] The Corps held public hearings, received written comments, and issued a decision denying the permit on the ground that the project would have an unacceptably adverse impact on the Canaan Valley wetlands, and could not be justified on the basis of feasible alternatives.[12]

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[8] *Id.* at 59, J. App. 216. The judge further found that "none of the proposed mitigation plans appears reasonably appropriate or feasible to effectively outweigh the negative aspects inherent in the adoption of the proposed project, requiring the flooding of a considerable part of the floor of Canaan Valley and radically changing its whole interdependent environment." *Id.* In denying the application as proposed, the judge, however, approved an alternate plan, *id.* at 66, J. App. 223, which would have required inundation of only 700 acres. *Id.* at 36-37, J. App. 193-194.

[9] *Monongahela Power Co.*, Project No. 2709 (F.P.C. Apr. 21, 1977) at 28, J. App. 261 (opinion and order).

[10] *Id.* The grant of the license is the subject of three petitions for review pending in this court. The court has heard oral argument on these petitions, but has stayed further proceedings pending resolution of the instant appeals. *Sierra Club v. FERC*, Nos. 77-1736, 77-1737, 77-1845 (D.C. Cir. June 15, 1981) (order).

[11] Letter from J. H. Bail, Director, Power Engineering, Allegheny Power System, to District Engineer, United States Army Engineer District, Pittsburgh, Pa., (Jan. 23, 1978), J. App. 58.

[12] District Engineer's Findings of Fact at 11, J. App. 695 (July 14, 1978). Like FPC's administrative law judge, see note 8 *supra* and accompanying text, the District Engineer noted that the "muskeg, swamp forest, [and] wet meadows [] harbor a diversity of plants and animals . . . made possible only because of the size of the wetlands and the juxtaposition of the habitat types," and declared that the loss of these would be "an irreplaceable one." *Id.*

The Monongahela group then instituted this litigation in the District Court against the Secretary of the Army and other officials.[13] Although Monongahela had invoked the jurisdiction of the Corps of Engineers in its quest for the permit, it now claimed that the Corps had no power to require a permit of an FPC-licensed project.[14] On cross-motions for the summary judgment, the District Court ruled in favor of Monongahela.[15] Reaching only the jurisdictional question,[16] the court held that the Corps had no authority to regulate discharges incidental to construction of Monongahela's hydroelectric facility because FPC had already licensed it.[17] Our review thus extends only to that determination.[18]

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[13] Complaint, *Monongahela Power Co. v. Alexander*, Civ. No. 78-1712 (D.D.C.) (filed Sept. 12, 1978), J. App. 47. We refer to the Monongahela group as Monongahela. The State of West Virginia and six conservation groups were permitted to intervene. More usually we refer to the defendants and these intervenors (all now parties in this court) collectively as the Secretary. Additionally, FERC has intervened in these appeals.

[14] Complaint, *supra* note 13, ¶¶ 29-32, J. App. 47-48.

[15] *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F. Supp. at 392.

[16] Monongahela had also claimed that FPC's prior licensing decision was res judicata on all issues the Corps could consider, Complaint, *supra* note 13, ¶¶ 38-46, J. App. 49-51; that the Corps was required to hold a formal adjudicative hearing on the permit application and to render a decision on the record, *id.* ¶¶ 47-56, J. App. 52-53; that various ex parte communications between Corps personnel and outside parties had tainted the proceeding and thus deprived Monongahela of due process, *id.* ¶¶ 57-61, J. App. 53-54; and that the Corps' decision was arbitrary, capricious, contrary to law, and not based upon substantial evidence, *id.* ¶¶ 62-66, J. App. 54-55. Since the District Court concluded that the Corps lacked jurisdiction to grant or deny a permit for construction of Monongahela's project, the court did not consider these contentions.

[17] *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F. Supp. at 392.

[18] See text *infra* at note 118.

Monongahela's position, which the District Court accepted, rests on the premise that beginning with the Federal Water Power Act of 1920,[19] Congress consolidated administrative authority over hydroelectric projects, and vested it originally in FPC and thereafter in FERC, its successor.[20] The opposing argument is predicated upon the Federal Water Pollution Control Act Amendments of 1972,[21] which in Section 301(a) broadly declare unlawful "the discharge of any pollutant by any person,"[22] and then in Section 404(a) require a permit from the Corps for any discharge of dredged or fill material into navigable waters.[23] The Secretary points out that Congress expressly exempted enumerated activities from the permit requirement[24] and alluded to no intention to except FPC-licensed hydroelectric projects therefrom.[25] Consequently, the Secretary contends, there is no room for imposition of an implied dispensation for the statutory scheme.

II.

Prior to 1920, the responsibility for licensing and overseeing hydroelectric facilities was dispersed among several

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[19] Act of June 10, 1920, ch. 285, 41 Stat. 1063 (current version codified at 16 U.S.C. §§ 791a-825r (1982)).

[20] Brief for Appellees at 20-29.

[21] *Supra* note 1.

[22] 33 U.S.C. § 1311(a) (1982) (quoted *supra* note 2).

[23] *Id.* § 1344(a). See generally *United States v. Riverside Bayview Homes, Inc.*, ___ U.S. ___, ___, 106 S.Ct. 455, 457, 88 L.Ed.2d 419, 424 (1985) (under § 301, "any discharge of dredged or fill materials into 'navigable waters'—defined as the 'waters of the United States'—is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to § 404"); *P.F.Z. Properties, Inc. v. Train*, 393 F.Supp. 1370, 1381 (D.D.C. 1975); *United States v. Bradshaw*, 541 F.Supp. 880, 882 (D. Md. 1981); *United States v. Alleyne*, 454 F.Supp. 1164, 1169-1170 (S.D.N.Y. 1978).

[24] See 33 U.S.C. § 1344(f), (r) (1982).

[25] Brief for Federal Appellants at 25-27.

arms of the Federal Government, including Congress[26] and the Secretaries of War,[27] Agriculture,[28] and the Interior.[29] Resulting jurisdictional and policy conflicts complicated the expansion of hydroelectric power, and led to adoption of a new regulatory regime.[30]

The Federal Water Power Act of 1920[31] created FPC and assigned it the task of licensing and overseeing waterpower projects.[32] The Commission, which originally was composed of the Secretaries of War, Agriculture, and the Interior,[33] assumed "powers [t]heretofore exercised by the Secretaries in connection with water-power development

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[26] Rivers and Harbors Act of 1899, ch. 425, §§ 9, 10, 30 Stat. 1151 (current version codified at 33 U.S.C. §§ 401, 403 (1982)) (requiring congressional consent to obstructions into navigable waters).

[27] River and Harbor Act of 1890, ch. 907, 26 Stat. 453 (requiring consent of Secretary of War to abutments beyond harbor line). See also S. Rep. No. 180, 66th Cong., 1st Sess. 3-6 (1919) (history of legislation).

[28] Act of Feb. 1, 1905, ch. 288, 33 Stat. 628 (current version codified at 16 U.S.C. § 472 (1982)) (authority over hydroelectric facilities on national forest land).

[29] Act of Feb. 15, 1901, ch. 372, 31 Stat. 790 (authority over facilities on public lands).

[30] 3 B. Schwartz, The Economic Regulation of Business and Industry 1821 (1973).

[31] Act of June 10, 1920, ch. 285, 41 Stat. 1063 (current version codified at 16 U.S.C. §§ 791a-825r (1982)).

[32] Congress subsequently granted the Commission regulatory authority over electric power and natural gas. See Federal Power Act, ch. 687, tit. II, 49 Stat. 838 (1935) (current version codified at 16 U.S.C. §§ 791a-825r (1982)); Natural Gas Act of 1938, ch. 556, 52 Stat. 821 (codified as amended at 15 U.S.C. §§ 717-717w (1982)).

[33] Act of June 10, 1920, ch. 285, § 1, 41 Stat. 1063. The Secretaries were replaced by five full-time appointed members in 1930. Act of June 30, 1930, ch. 572, § 1, 46 Stat. 797 (codified as amended at 16 U.S.C. § 792 (1982)).

under their several jurisdictions."[34] As the Supreme Court has recounted, the Act

> was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.[35]

These and other characterizations of the newly-born FPC reflect the centralization of powers previously exercised by other federal entities independently,[36] with the goal of eliminating duplicative work, overlapping functions, and jurisdictional disputes.[37] In this sense, as the District Court noted, FPC's authority is "comprehensive."[38] The exclusivity of FPC's domain is clear, however, only with respect to the functions it inherited upon passage of the 1920 Act. There was, to be sure, a consolidation of extant responsibilities, but certainly no preemption of subsequently-enacted legislation.

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[34] S. Rep. No. 180, 66th Cong., 1st Sess. 6 (1919).

[35] *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180, 66 S.Ct. 906, 919, 90 L.Ed. 1143, 1158 (1946).

[36] See, e.g., *Hearings Before the House Comm. on Water Power*, 65th Cong., 2d Sess. 25 (1918) [hereinafter *Water Power Hearings*] (bill necessary "in order that whatever is done by existing agencies may be done under a consistent plan with a definite end in view") (statement of O.C. Merrill, Department of Agriculture); see generally *Chemehuevi Tribe v. FPC*, 160 U.S.App. D.C. 83, 91-93, 489 F.2d 1207, 1215-1217 (1973) (history of Federal Power Act), *rev'd in part on other grounds*, 420 U.S. 395, 95 S.Ct. 1066, 43 L.Ed.2d 279 (1975).

[37] *Water Power Hearings*, *supra* note 36, at 26.

[38] *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F.Supp. at 387. See *FPC v. Union Elec. Co.*, 381 U.S. 90, 98-99, 85 S.Ct. 1253, 1258-1259, 14 L.Ed.2d 239, 245-246 (1965).

A half-century later, Congress made another radical change in legislative policy[39] by adopting the Federal Water Pollution Control Act Amendments of 1972.[40] The product of a strong bipartisan movement in Congress[41] "to restore and maintain the chemical, physical and biological integrity of the Nation's waters,"[42] this enactment marked the ascendancy of water-quality control to the status of a major national priority.[43] Components of this effort were Section 301(a)'s broad ban on discharge of pollutants into navigable waters,[44] and Section 404(a)'s provision authorizing the Secretary to grant permits exempting therefrom the discharge of dredged or fill materials at specific disposal sites.[45]

Congress was aware that the 1972 enactment would have far-reaching consequences,[46] and recognized that some other legislative objectives would have to be reconciled

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[39] See 118 Cong. Rec. 10204 (1972), *reprinted in* 1 Comm. on Environment and Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 352 (Comm. Print 1973) [hereinafter cited as Legislative History] (statement of Rep. John A. Blatnik, Chairman, Committee on Public Works). The Committee considered the bill "a landmark in the field on environmental legislation." *Id.*, *reprinted in* 1 Legislative History at 350.

[40] Pub. L. No. 92-500, 86 Stat. 816 (1972) (principally codified as amended at scattered sections of 33 U.S.C. (1982)).

[41] See 118 Cong. Rec. 33712 (1972), *reprinted in* 1 Legislative History, *supra* note 39, at 208 (statement of Sen. Tunney).

[42] 33 U.S.C. § 1251(a) (1982).

[43] 118 Cong. Rec. 10204 (1972), *reprinted in* 1 Legislative History, *supra* note 39, at 350 (statement of Rep. Blatnik).

[44] 33 U.S.C. § 1311(a) (1982) (quoted *supra* note 2).

[45] *Id.* § 1344(a).

[46] See 118 Cong. Rec. 10204 (1972), *reprinted in* 1 Legislative History, *supra* note 39, at 350 ("far-reaching national commitment") (statement of Re. Blatnik); 118 Cong. Rec. 33712 (1972), *reprinted in* 1 Legislative History, *supra* note 39, at 208 ("decisive redirection in national policy") (statement of Sen. Tunney).

with the new pollution-control efforts. As the chairman of the House Committee on Public Works explained, "[t]hroughout the development of this most important legislation the committee could not forget the broad potential effects [on] competing priorities . . . [including] . . . energy supply . . . and protection of our natural resources."[47] It hardly can be said that the prescription of additional requirements for hydroelectric projects was an utterly unforeseen or inappropriate consequence.

Narrowing our scrutiny to Sections 301(a) and 404(a), we easily discern an effort to halt the systematic destruction of the Nation's wetlands.[48] Congress insisted upon stringent federal discipline in an effort to curb ecological pollution and degradation without interfering unjustifiably with farming, forestry, and other legitimate activities reserved for regulation primarily by local governments.[49] The result was dual scheme empowering the Corps of Engineers to issue permits pursuant to guidelines promulgated under Section 404(b)(1),[50] authorizing the states to establish and administer their own permit systems for specified dis-

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[47] 118 Cong. Rec. 10204 (1972), *reprinted in* 1 Legislative History, *supra* note 39, at 352 (statement of Rep. Blatnik).

[48] 123 Cong. Rec. 26697 (1977), *reprinted in* 4 Comm. on Environment and Public Works, 95th Cong., 2d Sess., A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act, at 869 (Comm. Print 1978) [hereinafter cited as Clean Water Act Legislative History] (statement of Sen. Muskie). Senator Muskie explained the significance of wetlands: "They represent a principle [sic] source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife." *Id.*

[49] *Id.*, *reprinted in* 4 Clean Water Act Legislative History, *supra* note 48, at 869-870.

[50] 33 U.S.C. § 1344(b)(1) (1982).

charges upon approval by the Administrator of the Environmental Protection Agency (EPA).[51]

III

Indisputably, construction of Monongahela's proposed hydroelectric facility will entail discharges of dredged and fill material into navigable water.[52] Consequently, Sections 103(a) and 404(a) would seem to require a Corps permit for such discharges unless some exemption is available.[53] Although Section 404(f) specifically excludes a number of activities from the permit requirement,[54] it contains no express exception for FPC-licensed hydroelectric projects. We are thus confronted by the question whether such an exception may properly be implied.

In the only case to address the problem squarely, *Scenic Hudson Preservation Conference v. Callaway*,[55] the Second

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[51] *Id.* §§ 1344(g), (h); see *United States v. Riverside Bayview Homes, Inc.*, *supra* note 23, ___ U.S. at ___ n.1, 106 S.Ct. at 457 n.1, 88 L.Ed.2d at 424 n.1 ("[w]ith respect to certain waters, the Corps' authority may be transferred to States that have devised federally approved permit programs"); H.R. Rep. No. 830, 95th Cong., 1st Sess. 100-101 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 284-285 (explaining conference version of state program). EPA may approve a state permit system only if it includes "substantive decisionmaking criteria at least as stringent as [the Section] 404(b) guidelines." 123 Cong. Rec. 38996 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 419 (statement of Rep. Harsha).

[52] *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F.Supp. at 388.

[53] See 33 U.S.C. § 1344(f)(1) (1982); see also note 23 *supra*. Section 404(f) of the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1600 (amending 33 U.S.C. § 1344(f) (1976)), allows structures such as dikes and dams to be *maintained* without a permit, but did not lift the requirement of a permit for *construction* of these structures.

[54] See 33 U.S.C. § 1344(f) (1982).

[55] 370 F. Sup. 162 (S.D.N.Y. 1973), *aff'd per curiam*, 499 F.2d 127 (2d Cir. 1974).

Circuit affirmed a ruling that a Corps permit was needed for the discharge of dredge and fill material incidental to hydroelectric construction despite prior licensure by FPC.[56] The District Court in that proceeding considered and rejected the very argument pressed by Monongahela in the present cases:[57] that an exception to the Federal Water Pollution Control Act Amendments should be inferred on the ground that "Congress could not have intended to interfere with the jurisdiction of the FPC in view of the long-settled policy . . . of allowing that agency unique control over the production of hydroelectric power."[58] The court instead concluded that "Congress would not design an Act which on its face is all-inclusive, but for specifically enumerated exceptions, and yet intend to establish an unmentioned exception of the scale suggested . . . ."[59] If Congress desired to exempt FPC licensed facilities, the court noted, "the remedy rests in Congress' hands . . . ."[60]

Congress amended the Act in 1977,[61] only three years after the Second Circuit affirmed *Scenic Hudson*. If perchance Congress did not care for *Scenic Hudson*, it had an excellent opportunity at that time to overturn it, but it chose not to do so. And the continued omission from the 1977 Amendments, of any exemption for FPC-licensed projects is "striking,"[62] given the fact that *Scenic Hudson*

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[56] *Scenic Hudson Preservation Conference v. Callaway*, *supra* note 55, 370 F.Supp. at 171.

[57] See text *supra* at note 20.

[58] *Scenic Hudson Preservation Conference v. Callaway*, *supra* note 55, 370 F.Supp. at 170.

[59] *Id.*

[60] *Id.*

[61] See note 53 *supra*.

[62] *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F. Supp. at 388.

had attached decisive importance to that omission from the 1972 legislation.[63]

The District Court, however, felt that nonetheless the impact of *Scenic Hudson* had been "diminished" by two subsequent events.[64] The first was a reference in the Conference Report on the Department of Energy Organization Act of 1977 to "exclusive jurisdiction . . . over certain functions transferred from the FPC."[65]

When, in that legislation, Congress restructured the federal approach to energy problems, it reallocated many of the powers theretofore exercised by FPC, including issuance and renewal of hydroelectric licenses,[66] to the newly-created Energy Regulatory Commission (FERC).[67] The Conference Report mentioned this licensing authority as one of the activities within FERC's "exclusive jurisdiction."[68] The District Court, attributing great significance to the word "exclusive," treated this statement as congressional support for the conclusion that the Corps of Engineers lacked statutory authority over Monongahela's FPC-licensed hydroelectric project.[69] We find that the court erred in doing so.

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[63] See text *supra* at notes 59-60.

[64] *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F. Supp. at 388.

[65] H.R. Rep. No. 539 (Conf.), 95th Cong., 1st Sess. 75 (1977), *reprinted in* [1977] U.S. Code Cong. & Ad. News 925, 946 [hereinafter cited as Conference Report], pertaining to Pub. L. No. 95-91, § 402(a), 91 Stat. 582 (1977) (codified at 42 U.S.C. § 7172(a) (1982)) ("Section 402(a) describes the exclusive jurisdiction of the [Federal Energy Regulatory] Commission over certain functions transferred from the FPC")

[66] 42 U.S.C. § 7172(a)(1)(A) (1982).

[67] *Id.* § 7172(a) (1982).

[68] Conference Report, *supra* note 65, at 75, *reprinted in* [1977] U.S. Code Cong. & Ad. News at 946.

[69] *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F.Supp. at 389.

The Conference Report itself explains the meaning of the terminology the court relied upon. "This exclusive jurisdiction," it said, "consists of functions transferred from the FPC which will be within the sole responsibility of [FERC] to consider and to take final agency action on without further review by the Secretary [of Energy] or any other executive branch official."[70] This category of FERC authority[71] was set off in contradistinction to other vestigial functions of the former FPC, which were either made solely the Secretary's responsibility[72] or left as "incidental power" available to both FERC and the Secretary.[73] Put another way, FERC's "exclusive jurisdiction" simply denoted that it was to be the highest unit in a vertical line with respect to decisions in the areas specified, including licensure; it had nothing to do with a relationship of FERC to other federal bodies on a horizontal line. Thus the conferees' use of the words "exclusive jurisdiction"—which are not found in the statute itself—is fully and sensibly comprehended without imparting an exaggerated importance to them. It follows that although the Department of Energy Organization Act undoubtedly endowed FERC richly with authority,[74] it did not expand the jurisdiction it derived from its predecessor so as to preclude the Secretary of the Army from exerting his powers over the

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[70] Conference Report, *supra* note 65, at 75, *reprinted in* [1977] U.S. Code Cong. & Ad. News at 946.

[71] See 42 U.S.C. § 7172(a) (1982).

[72] See 42 U.S.C. § 7151(b) (1982) (placing functions not vested in FERC under Secretary's authority); *id.* 7172(f) (exempting certain matters from FERC's jurisdiction); see also Conference Report, *supra* note 65, at 76, *reprinted in* [1977] U.S. Code Cong. & Ad. News at 947.

[73] [T]he Secretary as well as the Commission, may utilize the incidental power contained in the Federal Power Act or the Natural Gas Act." Conference Report, *supra* note 65, at 76, *reprinted in* [1977] U.S. Code Cong. & Ad. News at 947.

[74] See S. Rep. No. 164, 95th Cong., 1st Sess. 6.

Nation's navigable waters.[75]

The second event inducing the District Court's belief that *Scenic Hudson's* force had been dissipated was the Supreme Court's 1976 decision in *Train v. Colorado Public Interest Research Group.*[76] As we read *Train*, however, it does not assist the present analysis. The issue there was whether EPA's authority under the Federal Water Pollution Control Act to control the disposal of nuclear waste encompasses materials subject to regulation by the Atomic Energy Commission under the Atomic Energy Act.[77] Although that question bears a superficial resemblance to the one before us, the factor determinative in *Train* is completely absent here. The *Train* Court based its decision upon a "rather explicit statement of [congressional] intent to exclude AEA-regulated materials from the FWPCA."[78] Congress has not, however, manifested comparably any purpose to exclude FPC-licensed hydroelectric projects from Section 404(a)'s permit requirement when otherwise applicable. On the contrary, as we have seen, Congress omitted hydroelectric installations from the list of facilities specifically exempted from that requirement, and did not articulate an exclusionary intent even in the face of the

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[75] Nor is a second reference to "exclusive" authority cited by the District Court apposite. In *First Iowa Hydroelec. Coop. v. FPC, supra* note 35, the Court sustained FPC's jurisdiction against state regulation, holding that the federal power preempted conflicting state policy. 328 U.S. at 182, 66 S.Ct. at 920, 90 L.Ed. at 1159. This cannot be reliably extrapolated to the proposition that FPC's jurisdiction was exclusive with respect to another federal agency whose relevant powers were conferred long thereafter, and whose primary statutory mission implicates very different objectives.

[76] 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976).

[77] *Id.* at 3-4, 96 S.Ct. 1939, 48 L.Ed.2d at 437.

[78] *Id.* at 22, 96 S.Ct. at 1948, 48 L.Ed.2d at 448; see also *id.* at 24, 96 S.Ct. at 1948-1949, 49 L.Ed.2d at 449 ("the legislative history reflects, on balance, an intention to preserve the preexisting regulatory plan") (footnote omitted).

inclusionary judicial interpretation announced in *Scenic Hudson.*[79]

Moreover, the posture of *Train* was the exact converse of that of the case before us. There EPA had adopted regulations exempting from its licensing program all materials covered by the Atomic Energy Act.[80] Here the Corps of Engineers had promulgated a regulation explicitly requiring a Section 404(a) permit for "[a]ny part of a structure or work licensed by the Federal Power Commission that involves the discharge of dredged or fill material into the waters of the United States."[81] The deference due an

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[79] See text *supra* at notes 59-63.

[80] *Train v. Colorado Pub. Interest Research Group, supra* note 76, 426 U.S. at 8, 96 S.Ct. at 1941, 48 L.Ed.2d at 440.

[81] 33 C.F.R. § 323.3(e) (1982). In July, 1982, shortly after submission of this case, the Corps of Engineers revised the regulations affecting permits for the discharge of dredged or fill materials into navigable waters of the United States. See 47 Fed. Reg. 31794 (1982) (codified at 33 C.F.R. pts. 320, 323 (1986)). Although the new regulations do not include § 323.3(e), which had expressly required a Corps permit for FPC-licensed projects, the clear effect of the revisions in their entirety is still to mandate a Corps permit for the type of FPC-licensed project sought to be undertaken by Monongahela here. Revised § 323.3(a) provides that

> [i]f a discharge of dredged or fill material is not exempted by § 323.4 of this part or permitted by [new] 33 C.F.R. Part 330, an individual or regional Section 404 permit will be required for the discharge of dredged or fill material into waters of the United States.

33 C.F.R. § 323.3(a) (1986). FPC-licensed projects are not expressly exempted from the permit requirements under revised § 323.4. See also *infra* at notes 85-94. Furthermore, new § 330.5(a)(17) would not relieve Monongahela of the burden of obtaining a Corps permit in this case. That section describes a type of project licensed pursuant to the Federal Power Act that would not be subject to the individual or regional permit requirement:

> Fills associated with small hydropower projects as existing reservoirs where the project which includes the fill is licensed by the Federal Energy Regulatory Commission under the Federal Power

agency's construction of its governing statute[82] fortifies the dissimilarity of the two cases.[83]

We realize that the histories of the pertinent statutes do not themselves conclusively answer the question we

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Act of 1920, as amended; has a total generating capacity of not more than 1500 kw (2,000 horsepower); qualifies for the short-form licensing procedures of the Federal Energy Regulatory Commission (see 18 C.F.R. 4.61); and the district or division engineer makes a determination that the individual and cumulative adverse effects on the environment are minimal . . . .

33 C.F.R. § 330.5(a)(17) (1986). But the project proposed by Monongahela calls for construction of two new reservoirs and a plant with a generating capacity in excess of 1500 kw, see text *supra* at notes 6-7—a project the Corps of Engineers has already found to involve a serious, adverse and irreversible impact on the environment, see note 12 *supra* and accompanying text—and thus a facility subject to the § 404 individual or regional permit requirement as implemented by the revised regulations. Particularly since the parties have not informed us of any inconsistent interpretation of the effect of the new regulations, we can only conclude that the revisions in the regulations to have no significant role in the resolution of the issue in this case.

[82] See, e.g., *United States v. Riverside Bayview Homes, Inc.*, *supra* note 23, ___ U.S. at ___, 106 S.Ct. at 461, 88 L.Ed.2d at 429 (Army Corps of Engineers' construction of Federal Water Pollution Control Act Amendments of 1972 "entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress"); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125, 105 S.Ct. 1102, 1108, 84 L.Ed.2d 90, 99 (1985); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694, 701-703 (1984); *Blum v. Bacon*, 457 U.S. 132, 141, 102 S.Ct. 2355, 2361, 72 L.Ed.2d 728, 736 (1982); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965); *Power Reactor Dev. Co. v. International Union of Elec. Workers*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924, 932 (1961); *Capitol Technical Serv., Inc. v. FAA*, ___ U.S. App.D.C. ___, ___, 791 F.2d 964, 970 (1986); *Storer Communications, Inc. v. FCC*, 246 U.S.App.D.C. 146, 150, 763 F.2d 436, 440 (1985); *Eagle Picher Indus.*,

face.[84] At this juncture, however, we can conclude only that the Power Act does not provide adequate justification for ignoring the express and unambiguous directive of the subsequently-adopted Pollution Control Act Amendments.

U.S.App.D.C. 146, 150, 763 F.2d 436, 440 (1985); *Eagle Picher Indus., Inc. v. EPA*, 245 U.S.App.D.C. 196. 201 n.5, 759 F.2d 922, 927 n.5 (1985).

[83] The *Train* Court disavowed any dependence upon EPA's interpretation of the Federal Water Pollution Control Act. 426 U.S. at 8 n.8, 96 S.Ct. at 1941 n.8, 48 L.Ed.2d at 440 n.8. We believe, however, that the Corps' construction is a factor properly to be considered since we have no express legislative intent to guide us. See cases cited *supra* note 82.

[84] Nor does the recent decision in *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984), aid resolution of the dispute before us. An issue confronting the Court there was whether § 8 of the Mission Indian Relief Act of 1891, 26 Stat. 714, requires a FPC license to obtain the consent of an Indian tribe before operating a facility on its reservation lands. Section 8 authorizes private parties to contract with Indians, subject to approval by the Secretary of the Interior, for the right to construct a flume or other appliance for the conveyance of water through Indian lands. Finding nothing in the legislative history of the Act to suggest that Indians were to have any greater right than other private landowners to resist exertions of congressional authority, and citing its earlier ruling in *FPC v. Tuscarora Indian Nation*, 362 U.S.99, 118, 80 S.Ct. 543, 554, 4 L.Ed.2d 584, 597 (1960), that Congress intended the Federal Power Act to encompass Indian lands, the Court held that the Mission Indian Relief Act did not enable Indians "to override Congress' subsequent decision that all lands, including tribal lands, could, upon compliance with the provisions of the [Power Act], be utilized to facilitate hydroelectric projects." *Id.* at 787, 104 S.Ct. at 2117-2118, 80 L.Ed.2d at 769-770. See, e.g., H.R. Rep. No. 910, 66th Cong., 2d Sess. 8 (1920) (elimination by conferees of proposed amendment to Power Act requiring Indian consent; "no reason why waterpower should be singled out from all other uses of Indian reservation land for special action of the council of the tribe"). In the case at bar, unlike *Escondido*, there is no indication that Congress intended FPC-licensed hydroelectric projects to be exempt from compliance with the additional standards established by the Federal Water Pollution Control Amendments of 1972; indeed, we think the statutory scheme signifies the contrary. See text *infra* at notes 85-117.

Monongahela, however, would have us read into the latter a double-barreled exemption, enabling it to sidestep the anti-discharge mandate of Section 301(a) and simultaneously escape the permit requirement of Section 404(a). We turn, then, to an analysis of Section 404(a) and its express exceptions to determine whether such an implied dispensation for FPC-licensed projects would be in keeping with the statutory scheme.

IV

The exemptions to Section 404(a)'s permit program may be briefly categorized. First, the Corps of Engineers may issue general permits in lieu of requiring individual applications when multiple discharges cumulatively have but minimal adverse environmental effects and the activities contemplated are similar in nature and pass muster under the Section 404(b)(1) guidelines.[85] Second, certain activities leading only to minor discharges are exempt from the permit requirement[86] because Congress felt that they could be more effectively dealt with in "best management practices" reviews[87]—an alternative regulatory approach affording, under the aegis of a state "a degree of protection

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[85] 33 U.S.C. § 1344(e)(1) (1982); see H.R. Rep. No. 830 (Conf.), 95th Cong., 1st Sess. 100 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 284; see generally *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 511 (10th Cir. 1985).

[86] 33 U.S.C. § 1344(f)(1) (1982).

[87] 123 Cong. Rec. 38996 (1977) (statement of Rep. Harsha), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 420-421. The statute allows certain activities to be regulated under an areawide management program instead of by the case-by-case permit scheme of § 404. 33 U.S.C. § 1288 (1982). Activities conducted pursuant to a best-management practice must comply with the Section 404(b)(1) guidelines. Id. § 1288(b)(4)(B)(iii).

comparable to that of section 404(b)(1) guideline review."[88] Activities qualifying for this treatment include normal farming, silviculture, ranching, maintenance, drainage, and road construction.[89] Third, discharges approved under qualified state programs do not need the federal permit.[90] A state program displaces the federal, however, only if the Section 404(b)(1) guildlines strictures are met or exceeded.[91] Finally, a fourth statutory exception exempts those federal projects specifically identified by Congress.[92] To be free of the Section 404(a) permit requirement, the sponsor of such a project must have submitted to Congress as "adequate" environmental impact statement "including consideration of the guidelines developed under" Section

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[88] See 123 Cong. Rec. 39187 (1977) (statement of Sen. Muskie), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 471 ("[e]ach individual activity or practice must be scrutinized in light of the section 404(b)(1) guidelines and approved by the Administrator before the permit exemption is available").

[89] 33 U.S.C. § 1344(f)(1) (1982); see generally *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 925-926 (5th Cir. 1983).

[90] 33 U.S.C. § 1344(g) (1982).

[91] See note 52 *supra*.

[92] See 33 U.S.C. § 1344(r) (1982). This exemption was included in the conference version of the bill in recognition of the constitutional principle of separation of powers. H.R. Rep. No. 830 (Conf.), 95th Cong., 1st Sess. 104 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 288. The narrow nature of this exemption is under scored by the fact that it applies only to discharges integral to construction of designated federal projects. See *id.*, *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 288; 123 Cong. Rec. 38995 (1977), reprinted in 3 Clean Water Act Legislative History, *supra* note 48, at 416 ("[t]he conferees did not intend to exempt other discharges which may be associated generally with constructing Federal projects, but which are ancillary to the specific activities submitted to and approved by Congress") (statement of Rep. Stark). Accord 123 Cong. Rec. 38997 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 420 (statement of Rep. Harsha); 123 Cong. Rec. 39209 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 524-525 (statement of Sen. Baker).

404(b)(1).[93] Of central importance in the House debates was the assurance that consideration and acceptance of the environmental impact statement by Congress would be "equivalent to" review under the Section 404(b)(1) guidelines.[94]

When analyzed in this fashion, Section 404 transmits a crisp and unwavering message: all significant discharges, whether or not exempt from the permit requirement, must be subjected to Section 404(b)(1) scrutiny or its equivalent; some competent body, be it the Corps of Engineers, EPA, Congress, or the state where the discharge is to occur, must perform a Section 404(b)(1) review.[95] Every type of discharge embraced by an exemption must survive a check of this kind. We think fidelity to the legislative scheme precludes any implication of an additional exemption for FPC-licensed projects when, at the bare minimum, FPC did not subject its license applicants to a review under substantive standards comparable to those established pursuant to Section 404(b)(1).

The factors to be utilized in considering applications for a Section 404 permit are delineated in the implementing guidelines[96] mandated by the statute.[97] The guidelines declare that ("[t]he guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources."[98] The

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[93] 33 U.S.C. § 1344(r) (1982).

[94] 123 Cong. Rec. 39187 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 472 (statement of Sen. Muskie). Accord 123 Cong. Rec. 39209 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 524-525 (statement of Sen. Baker); 123 Cong. Rec. 39210 (1977), *reprinted in* 3 Clean Water Act Legislative History, *supra* note 48, at 529 (statement of Sen. Wallop).

[95] See notes 85-94 *supra*.

[96] 40 C.F.R. pt. 230 (1986).

[97] 33 U.S.C. § 1344(b) (1982).

[98] 40 C.F.R. § 230.1(d) (1986).

guidelines specify additionally that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem. . . ."[99] A series of considerations, warnings, and evaluative techniques comprises many pages of regulations controlling the issuance of permits.[100] Some absolute restrictions are imposed,[101] while other sections address the potential losses to be expected from discharges and the means for minimizing them.[102] These guidelines furnish the yardstick by which the legitimacy of any implied exemption must be measured.[103] If FPC did not subject license applications to some test substantially equivalent to that found in the Section 404(b)(1) guidelines, its action will not measure up to the congressional plan.

The District Court looked to FPC's statutory obligation to regulate in the "public interest,"[104] and the Supreme Court's interpretation of that provision as a call to explore, among other matters, " 'the public interest in preserving

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[99] *Id.* § 230.10(a).

[100] The guidelines in effect at the time the Corps of Engineers denied Monongahela a permit provided a more stringent framework for evalutaion of its application. See, e.g., 40 C.F.R. § 230.5(b)(8) (1978) ("[d]ischarge of dredged material in wetlands may be permitted only when it can be demonstrated that the site selected is the least environmentally damaging alternative"). These guidelines were replaced with more lenient, but still mandatory, standards for use by the Corps in reviewing applications. 45 Fed. Reg. 85344 (Dec. 24, 1980). The fact that the guideline criteria have been eased since Monongahela's permit application was denied is of no consequence here since, as will appear, FPC did not subject Monongahela's license application to scrutiny comparable to either level.

[101] See 40 C.F.R. § 230.10 (1986).

[102] See, e.g., *id.* §§ 230.50(b), 230.51(b), 230.52(b).

[103] The Corps also considers the standards set forth in 33 C.F.R. § 320.4 (1986), which include an assortment of additional factors.

[104] See 16 U.S.C. § 797(e) (1982).

reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wild life.' "[105] But the explicit conservation-oriented Section 404(b)(1) directives under which the Corps labors have nowhere been matched in the mandate given FPC. The District Court undertook a comparison of the Section 404(b)(1) guidelines with those under which FPC operated,[106] and felt that the latter "echo[] the balancing process" in which the Corps engages.[107] The fact, however, is that aside from other considerations, a critical difference renders the two radically distinct. The FPC guidelines were designed merely to assist license applicants in submitting information to FPC,[108] while Section 404(b)(1)'s are standards governing decisions by the Corps on permit applications.[109] The FPC guidelines imposed no direct restraints on FPC's deliberations or determinations; they did not indicate how FPC should treat the information it received;[110] nor was FPC obligated to seek specific goals in any wise analogous to those the Corps must strive for.[111] Moreover, the FPC guidelines assigned no relative weights to competing objectives, and provided FPC with no more assistance in its review than

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[105] *Monongahela Power Co. v. Alexander, supra* note 5, 507 F.Supp. at 391 (quoting *Udall v. FPC*, 387 U.S. 428, 450, 87 S.Ct. 1712, 1724, 18 L.Ed.2d 869, 883 (1967)).

[106] *Monongahela Power Co., supra* note 5, 507 F.Supp. at 391 (referring to 18 C.F.R. §§ 2.80-2.81 and app. A (1979)).

[107] *Id.*

[108] 18 C.F.R. pt. 2, app. A(1) (1986) (quoted *infra* note 110.)

[109] 40 C.F.R. § 230.2(b) (1986) ("[t]hese Guidelines *will be applied* in the review of proposed discharges") (emphasis added).

[110] "These guidelines . . . [i]dentify the kinds of information to be supplied by applicants to assist Federal Power Commission staff in an independent assessment of major Federal actions significantly affecting the quality of the human environment[.]" 18 C.F.R. pt. 2, app. A(1) (1986).

[111] See text *supra* at notes 96-103 and note 109 supra.

a general policy of adherence to the aims of the National Environmental Policy Act of 1969.[112] We would do violence to the legislative intent animating the Federal Water Pollution Control Act Amendments were we to find these unchanneled, precatory invitations for information equivalent to the rigorous study demanded of the Corps. Nor can we hold that the mere existence of an implied general obligation on FPC's part to consider conservation factors in its deliberations[113] created a format for decisionmaking, the absence of which is the crux of the present problem.

Given the two statutory sections and their respective legislative histories, congressional intent would be betrayed by implication of an exemption of FPC-licensed hydroelectric projects from the express requirements of the Water Pollution Control Act Amendments.[114] We do not view this

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[112] See 18 C.F.R. pt. 2, app. A(4)-(8) (1986).

[113] See text *supra* at notes 104-105.

[114] FERC urges us to find that § 401 of the Clean Water Act, 33 U.S.C. § 1341 (1982), provides an alternative to the statutory scheme for gaining an exemption from § 301's ban on discharges of pollutants into navigable waters. Supplemental Memorandum for Intervenor-Appellee at 3-6. Section 401 provides that

> [a]ny applicant for a federal license or permit to conduct an activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . . No license or permit shall be granted until the certification required by the section has been obtained . . . .

33 U.S.C. § 1341(a)(1) (1982). According to FERC, § 301 should be construed to allow permitting under § 401(a)(1), comprised of review by a state coupled with the grant of a permit or license under any one of a number of federal regulatory schemes, including the Federal Power Act. Supplemental Memorandum for Intervenor-Appellee at 4-6.

We reject this interpretation. FERC's approach is completely at odds with the plain language of § 301, which expressly describes the contours of permissible discharges: "Except as in compliance with this section

as a "repeal" of FPC authority[115] but as a reconciliation[116] seen by Congress as necessary to ensure the protection

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and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (1982). Section 301 thus does not tolerate attempted avoidance of its ban through an application of § 401, which is omitted from § 301's enumeration of statutory sections. Furthermore, the legislative history of § 401 reveals that the quoted provision was intended merely to assure that "any water quality requirements established under State law, more stringent than those requirements established under [the Clean Water Act], also shall through certification become conditions of any Federal license or permit." S. Rep. No. 92-414, 92d Cong., 1st Sess. 69 (1971). This history indicates no more than that state standards of water quality were to be preserved under the Clean Water Act, see *EPA v. State Water Sources Control Bd.*, 426 U.S. 200, 219, 96 S.Ct. 2022, 2031, 48 L.Ed.2d 578, 591 (1976); *United States Steel Corp. v. Train*, 556 F.2d 822, 830 (7th Cir. 1977), and supports no suggestion that § 401 was intended in any way to supplant the need for obtaining a Corps permit. Lastly, FERC's proposed permitting scheme is inconsistent with our conclusion that FPC review of dredge and fill activities under the Federal Power Act is inadequate when measured against § 404(b)(1) guidelines. See notes 96-113 *infra* and accompanying text.

[115] See *Monongahela Power Co. v. Alexander*, *supra* note 5, 507 F.Supp. at 391.

[116] We are advertent to the maxim that repeals by implication are not favored. E.g., *Watt v. Alaska*, 451 U.S. 259, 266-267, 101 S.Ct.. 1673, 1678, 68 L.Ed.2d 80,88 (1981); *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290, 301 (1974); *United States v. Hansen*, 249 U.S.App.D.C. 22, 26, 772 F.2d 940, 944 (1985), *cert. denied*, ___U.S. ___, 106 S.Ct. 1262, 89 L.Ed.2d 571 (1986). By giving appropriate effect to both statutory provisions, however, we repeal no legislation; on the contrary, we fulfill congressional intent. See e.g., *Reckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018, 104 S.Ct. 2862, 2881, 81 L.Ed.2d 815, 842 (1984) (where two statutes are " 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective' ") (citations omitted); *McKelvey v. Turnage*, ___U.S.App.D.C. ___, ___, 792 F.2d 194, 206 (1986) (opinion concurring in part and dissenting in part) (no need to find implicit repeal where "there is no necessary conflict between the [two] statutes").

of a vital national interest.[117]

The judgment appealed from is reversed. Concluding, as it did, that FPC's licensing of Monongahela's hydroelectric project immunized it from an exercise of the Corps' accustomed authority, the District Court did not address other contentions pressed by Monongahela.[118] Accordingly, we remand the case in order that it may now do so, and engage in such further proceedings consistent with this opinion as may become necessary.

So ordered.

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[117] As it aptly has been said, "the Federal Power Act is not immune from effects of other subsequent acts of Congress," *Applachian Power Co. v. United States*, 607 F.2d 935, 941 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 935, 100 S.Ct. 2151, 64 L.Ed.2d 787 (1980).

[118] See note 16 *supra*.

APPENDIX B

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA.

Civil Action No. 78-1712

MONONGAHELA POWER COMPANY, *et al.*,
Plaintiffs,

v.

CLIFFORD L. ALEXANDER, JR. LIEUTENANT GENERAL JOHN W. MORRIS, CORPS OF ENGINEERS, COLONEL MAX R. JANAIRO, JR.
Defendants,

THE STATE OF WEST VIRGINIA, THE SIERRA CLUB, WEST VIRGINIA HIGHLANDS CONSERVANCY, NATIONAL WILDLIFE FEDERATION, ENVIRONMENTAL DEFENSE FUND, THE NATIONAL AUDOBON SOCIETY,
Intervenor-Defendants.

FILED
DEC. 19, 1980
JAMES F. DAVEY, Clerk

MEMORANDUM

Plaintiffs, three power companies, bring this action against the United States Army Corps of Engineers (the Corps) and various individuals acting in their official capacities. They seek injunctive and declaratory relief regarding the Corps' denial of their application for a permit for the Davis Pumped Storage Hydroelectric Project (the Project), a complex of dams designed to produce power. Prior to the Corps' denial, a license to construct and operate the Project had been issued by the Federal Power

Commission (FPC), the predecessor of the Federal Energy Regulatory Commission (FERC).[1] Plaintiffs contend that the Corps is without jurisdiction to either grant or deny a permit for the Project, that the Corps is barred by principles of res judicata and collateral estoppel from denying a permit to a project already licensed by FPC, and that the hearing procedure conducted by the Corps violated their Due Process rights. The State of West Virginia and six conservation organizations were granted leave to intervene to brief the Court on state-related and environmental issues. Jurisdiction is properly founded upon 28 U.S.C. § 1331 (1976) and 5 U.S.C. §§ 701-03 (1976). The matter is before the Court on plaintiffs' joint motion and defendants' cross motion for summary judgment.

Plaintiffs' threshold contention, that the Corps is without jurisdiction to either grant or deny a permit, is based on the premise that Congress has vested all authority over hydroelectric projects in the FPC and its successors, to the exclusion of any other federal agency. This comprehensive authority is dated back to the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 (codified at 16 U.S.C. §§ 792 *et seq.* (1976)) (the Water Power Act). Defendants respond that the Corps has concurrent jurisdiction pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972, Pub.L. 92-500, 86 Stat. 816, 884 (codified at 33 U.S.C. § 1344 (Supp. III 1979)) (the FWPCAA). That section requires a permit issued by the Corps for any discharge of dredged or fill material into navigable waters, a process which construction of the Project would admittedly involve. Resolution of this apparent statutory conflict entails an inquiry into the origins and purposes of both Acts.

Prior to the enactment of the Water Power Act, federal control over water power was characterized by duplicative

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[1] Unless the context demands otherwise, the energy licensing authority will be referred to as the FPC, rather than the FERC.

and overlapping regulatory jurisdiction. Authority to license water power projects was shared among three agencies: the Department of Interior, the Department of Agriculture, and the Secretary of War. J. Kerwin, *Federal Water Power Legislation* 107 (1926). The Water Power Act was intended to coordinate the exercise of federal jurisdiction, H.R.Rep.No. 61, 66th Cong., 1st Sess. 5 (1919); and to that end the Act created the FPC with authority over federal water power projects. *See* 41 Stat. 1063 (1920).

At the time of its passage, the Water Power Act was administratively interpreted as concentrating all licensing authority in the FPC and providing "a complete and detailed scheme for the development . . . of all the water power resources of the public domain." 32 Op. Att'y Gen. 525, 528 (1921). The FPC's general counsel concluded that "it was the purpose of Congress to confer exclusive jurisdiction on the Federal Power Commission . . . over the matter of issuing licenses" for hydroelectric power projects. 1 FPC Ann.Rep. 156 (1921). This contemporaneous construction by the administering agency, combined with similar subsequent interpretations, is entitled to "great respect." *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 409-10, 95 S.Ct. 1066, 1074-75, 43 L.Ed.2d 279 (1975).

During the existence of the FPC, the courts interpreted this authority in the same manner. Prominent among the decisions is *First Iowa Hydroelectric Cooperative v. FPC*, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143 (1946), in which the Court examined the purposes and powers of the Water Power Act and found that

> It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of

> the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted. *Id.* at 180, 66 S.Ct. at 919.

Courts at other times have used comparable language, emphasizing that the purpose of the Act was to provide for "comprehensive control" over water resources, *FPC v. Union Electric*, 381 U.S. 90, 98, 85 S.Ct. 1253, 1257, 14 L.Ed.2d 239 (1959); to "centralize the authority" over water resources in one Government agency, *Northwest Paper Co. v. FPC*, 344 F.2d 47, 51 (9th Cir. 1965); and to give the FPC "exclusive jurisdiction." *United States v. Idaho Power Co.*, 85 F.Supp. 913, 915 (D.Id. 1949).

Congress itself has also construed the authority of the FPC as exclusive. When the authority was transferred to FERC pursuant to the Department of Energy Organization Act of 1977, Pub.L.No. 95-91, § 402(a)(1), 91 Stat. 565, 584 (codified at 42 U.S.C. § 7172(a)(1) (Supp. III 1979) (the Energy Organization Act)), Congress stated in the Conference Report that:

> Section 402(a) describes the exclusive jurisdiction of the Commission over certain functions transferred from the FPC. This exclusive jurisdiction consists of functions transferred from the FPC which will be within the sole responsibility of the Commission to consider and to take final agency action on without further review by the Secretary or any other executive branch official.

H.R.Rep.No. 539, 95th Cong., 1st Sess. 75 (Conference Report), *reprinted in* [1977] U.S.Code Cong. & Ad.News 854, 925, 946. Specifically included in this "exclusive jurisdiction" is power to issue licenses for hydroelectric projects. Energy Organization Act, § 402(a)(1)(A), 91 Stat. 584 (codified at 42 U.S.C. § 7172(a)(1)(A) (Supp. III 1979)).

While defendants and intervenors dispute the label "exclusive," and while the language used to describe the FPC's

authority does vary, the reach of its jurisdiction prior to 1972 was clear. Congress had created an agency and centralized in it *all* federal authority for licensing federal water power projects. This exclusive licensing authority preempted any conflicting state regulation, *see First Iowa Hydroelectric*, 328 U.S. at 181-82, 66 S.Ct. at 919-20, and precluded any concurrent federal jurisdiction. This historic statutory policy was apparently reaffirmed at the time of the passage of the Energy Organization Act. Were it not for the existence of the FWPCAA, there would be no difficulty in holding that the FPC's power here was exclusive.

However, the FWPCAA does exist and does disrupt the otherwise clear statutory mandate of the FPC. Section 404 of the FWPCAA, 33 U.S.C. § 1344 (Supp. III 1979), gives the Corps power to grant or deny permits for discharges of "dredged or fill material" into navigable waters. There is no exception for FPC-licensed hydroelectric projects. Since the Project concededly requires such a discharge, the Corps asserts that it, as well as the FPC, has the duty and the authority to license the project. Defendants contend that had Congress intended to preserve the FPC's exclusive licensing procedure, it could easily have done so and that the absence of any exemption in the 1972 FWPCAA is indicative of Congressional intent to give the Corps the power disputed here. They argue that this construction is futher strengthened by the Clean Water Act of 1977, in which Congress passed a number of specific exemptions to the Corps' licensing authority but again failed to exempt hydroelectric projects. Pub.L.No. 95-217, § 67, 91 Stat. 1566, 1600-06 (codified at 33 U.S.C. § 1344(f) and (r) (Supp. III 1979)). This omission in 1977 is all the more striking in that Congress was on notice that the FWPCAA had been construed as applicable to water power projects. *See Scenic Hudson Preservation Conference v. Calloway*, 370 F.Supp. 162 (S.D.N.Y. 1973), *aff'd per curiam*

499 F.2d 127 (2d Cir. 1974) (discussed more fully *infra*). The seemingly inevitable conclusion is that Congress, by not exempting FPC-licensed projects, intended them to be subject to the Corps' licensing jurisdiction.

That, indeed, was the holding in the only case which has confronted the apparent conflict between the FPC's exclusive jurisdiction and the Corps' general authority:

> Con Ed would infer an exception from the [FWPCAA] for hydroelectric plants on the theory that Congress could not have intended to interfere with the jurisdiction of the FPC in view of the long settled policy, discussed above, of allowing that agency unique control over the production of hydroelectric power. The argument is persuasive at first blush, but even more plausible is plaintiffs' contention that Congress would not design an Act which on its face is all-inclusive, but for specifically enumerated exceptions, and yet intend to establish an unmentioned exception of the scale suggested here. Without any indication that Con Ed's reading of the Congressional will is accurate, the carving out of so major an exception would be improper. If this was Congress' intention and the omission is mere oversight, the remedy rests in Congress' hands . . . .

Scenic Hudson Preservation Conference v. Callaway, 370 F.Supp. 162, 170 (S.D.N.Y. 1973). This finding was affirmed in a per curiam opinion describing the District Court's opinion as "well-considered." 499 F.2d at 128. While such a precise holding would normally govern any disposition here, two intervening events have diminished its authority.

First, Congress has now given an indication that the FPC's hydroelectric jurisdiction should be construed as exlusive, notwithstanding the FWPCAA. See H.R.Rep.No. 539, *supra*. Although the statement clearly describes the FPC jurisdiction as exclusive, and was made after both

the FWPCAA and the decision in *Scenic Hudson*, it is difficult to determine the weight it should be accorded. Had the Energy Organization Act actually created the FPC power at issue here, the Conference Report language would be controlling. The FPC's power would be exclusive, whatever duplicative licensing power the Corps might have possessed would have been repealed,[2] and the decision in *Scenic Hudson* overruled. If, on the other hand, the statement were merely a legislative comment upon a previously enacted statute, it would still be entitled to "some consideration as a secondarily authoritative expression of expert opinion." *Bobsee Corp. v. United States*, 411 F.2d 231, 237 n.18 (5th Cir. 1969); 2A Sands, *Statutes and Statutory Construction*, § 49.11, at 266 (4th ed. 1973); *see Esquire, Inc. v. Ringer*, 591 F.2d 798, 803 (D.C.Cir. 1978). While allowing the statement even this minimal consideration would cast doubt upon the continuing validity of *Scenic Hudson*, the better course is to interpret its authority as somewhere between the two extremes. The Energy Organization Act did not simply transfer to FERC certain powers of the FPC; it created additional ones and consolidated others. It was a sweeping transformation of the entire field of energy regulation. As such, the statement is as much an indication of the jurisdiction Congress intended to allocate to FERC in 1977 as it is an expression of its understanding of prior legislation. Although it did not, perhaps, conclusively overrule *Scenic Hudson*, nor repeal whatever concurrent jurisdiction the Corps may have had under the FWPCAA, the statement is sufficiently authoritative to undermine the precedential value of the contrary conclusion in *Scenic Hudson*.

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[2] Defendants and Intervenors have questioned whether the Energy Organization Act should be construed as repealing by implication the concurrent jurisdiction of the Corps. Because the Court's disposition of the issue of the Corps' jurisdiction, that question need not be dealt with.

The second intervening event was *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976), where the Supreme Court ruled that there do exist inferable exceptions to the facially inclusive licensing authority vested by the FWPCAA in the Corps. The FWPCAA was found inapplicable to the discharge of nuclear pollutants, the regulation of which the Atomic Energy Commission (AEC) considered within its sole jurisdiction. The Court noted that the regulatory authority of the AEC was "comprehensive," *id.* at 5, 96 S.Ct. at 1940, and preemptive of any state regulation. *Id.* at 15-16, 96 S.Ct. at 1944-45. It further noted that it would expect a "clear indication of legislative intent" to change such a "pervasive regulatory scheme." *Id.* at 24, 96 S.Ct. at 1948. Examining the relevant legislative history, it then found that Congress had specifically intended to preserve the preexisting regulatory plan. *Id.* If there were similar legislative history in the FWPCAA preserving the jurisdiction of the FPC, Train would obviously be controlling. However, no such history can be found and that crucial distinction allows each side to claim Train as its own. Defendants contend that the case allows this Court to look only to the legislative history of the FWPCAA to find an exemption for hydroelectric projects. Since no such exemption can be found, none could have been intended, just as *Scenic Hudson* concluded. Plaintiffs insist, conversely, that *Train* overrules *Scenic Hudson* by implication, and this appears the better argument.

The key lies in the three-step approach implicit in the Court's analysis in *Train*. First, there must be a comprehensive or pervasive regulatory plan which is threatened with change by a subsequent statute. *Train*, 426 U.S. at 24, 96 S.Ct. at 1948. If such a situation exists, the Court will next search for Congressional intent to preserve the preexisting regulatory framework, a search which was successful in *Train*. Not finding any intent to preserve, a third step would be necessary before the Court would rec-

ognize any change in an established regulatory plan: it would look for and normally expect to find a specific Congressional intent to make such a change. *Id.* This third step of the analysis is based on long-established law, *see United States v. United Continental Tuna Corp.*, 425 U.S. 164, 169, 96 S.Ct. 1319, 1323, 47 L.Ed.2d 653 (1976); *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936), but is an approach *Scenic Hudson* failed to use. The only burden assumed there was searching for an intent to preserve the FPC's jurisdiction through an exemption from the FWPCAA. To the extent that *Scenic Hudson* looked no further, *Train* must be seen as modifying its result.

However, even the third step implicit in the *Train* analysis does not dispose of the dispute here. Although the regulatory scheme administered by the FPC is as comprehensive and pervasive as the nuclear regulation at issue in *Train*, the legislative history of the FWPCAA reveals neither an intent to preserve the FPC jurisdiction, nor an intent to change it. Thus to resolve the statutory conflict other principles of statutory construction must be examined.

The first principle applicable is the "cardinal rule" that repeals by implication are not favored. *Morton v. Mancari*, 417 U.S. 535, 549, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974) (quoting *Posadas v. National City Bank*, 296 U.S. at 503, 56 S.Ct. at 352); *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Commission*, 393 U.S. 186, 193, 89 S.Ct. 354, 358, 21 L.Ed.2d 334 (1968). That is undoubtedly the situation here. If the Corps' concurrent and duplicative jurisdiction over FPC-licensed projects is found valid, the statutory policy of centralized, coordinated licensing procedures for such projects, dating back to 1920, will be repealed. There is also no doubt that the repeal would be by implication since there is no evidence that Congress specifically and consciously intended to effect such a repeal. Under such cir-

cumstances the second applicable precept is that a court can find an implied repeal only if the two statutes are "irreconcilable," *Morton v. Mancari*, 417 U.S. at 550, 94 S.Ct. at 2482; or clearly "repugnant." *United States v. Borden Co.*, 308 U.S. 188, 198-99, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939); *see also TVA v. Hill*, 437 U.S. 153, 189-90, 98 S.Ct. 2279, 2299, 57 L.Ed.2d 117 (1978). In essence, then, the Court's duty here is to compare the two statutes in purpose and operation, to attempt to give effect to both, and to repeal the exclusive authority of the FPC only if it is clearly repugnant to the purpose and operation of the FWPCAA.

An analysis of the sets of factors used by the two agencies in reaching determinations under the respective statutes reveals no substantial or overriding differences. The operation of the FWPCAA requires that before the Corps issues a permit under Section 404, all relevant factors must be carefully weighed and the benefits balanced against the detriments. These factors include "conservation, *economics*, esthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, naviation, recreation, water supply, water quality, *energy needs*, safety, food production, and, in general, the needs and welfare of the people." 33 C.F.R. § 320.4(a) (1979) (emphasis added). A permit will only be granted if it is in the "public interest." *Id. See also* W. Rodgers, *Environmental Law* § 4.7, at 407 (1977). The Corps must also consider whether the benefits of the project outweigh the damage to wetlands. 33 C.F.R. § 320.4(b)(a) (1979).

The operation of the FPC under its exclusive statutory authority has been described by the Supreme Court:

> The question whether the proponents of a project "will be able to use" the power supplied is relevant to the issue of the public interest. So too is the regional need for the additional power. But the inquiry

> should not stop there. A license under the Act empowers the licensee to construct, for its own use and benefit, hydroelectric projects utilizing the flow of navigable waters and thus, in effect, to appropriate water resources from the public domain. The grant of authority to the Commission to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreationally purposes, and the protection of wildlife.
>
> The need to destroy the river as a waterway, the desirability of its demise, the choices available to satisfy future demands for energy—these are all relevant to a decision.

Udall v. FPC, 387 U.S. 428, 450, 87 S.Ct. 1712, 1724, 18 L.Ed.2d 869 (1967). Moreover, the FPC has adopted as part of its decision-making process the guidelines and goals of the National Environmental Policy Act, 42 U.S.C. §§ 4321-47 (1976) (NEPA). See 18 C.F.R. §§ 2.80-2.81 and App. A (1979). That procedure echoes the balancing process used by the Corps in Section 404 permit applications. See, Rodgers, *supra* at 407. Specifically included among the factors which must be reported to and evaluated by the FPC are "areas of critical environmental concern, e.g., wetlands" 18 C.F.R.App. A § 2.2.3, at 137 (1979). Finally, the FPC also uses its own regulations on conservation of natural resources, see *id.* at § 2.14, which were issued pursuant to the Federal Power Act, 16 U.S.C.§§ 791a-825r

(1976), a successor to the Water Power Act. It is thus apparent that each agency evaluates approximately the same elements in arriving at the ultimate goal of the public interest. Consequently, the operations of each agency under the relevant statutes are neither irreconcilable nor repugnant to each other.

Even allowing that the operations may be similar, defendants nevertheless assert that the purposes and goals of each agency under the respective statutes are so different as to be inconsistent. They contend, citing *Scenic Hudson*, that although the FPC may review the same environmental factors as the Corps, it is not required to do so. This is not entirely accurate. The Supreme Court and other courts have consistently held that such factors are relevant to an FPC decision and must be considered. *NAACP v. FPC*, 425 U.S. 662, 670 & n.6, 96 S.Ct. 1806, 1811 & n.6, 48 L.Ed.2d 284 (1976) (consideration of environmental and conservation questions a subsidiary purpose of the Act); *Udall v. FPC*, 387 U.S. at 450, 87 S.Ct. at 1724 (FPC determination can only be made after exploration of all relevant issues including recreation, wildlife, and wilderness preservation); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 614 (2d Cir. 1965) (statutory phrase "recreational purposes" encompasses conservation of natural resources and maintenance of natural beauty). It should also be noted that while environmental factors are specifically relevant to the FPC's determination of public interest, many other national statutory policies are beyond its consideration. *NAACP v. FPC*, 425 U.S. at 670, 96 S.Ct. at 1811. In addition, NEPA requires the FPC to consider the relevant environmental factors. *Greene County Planning Board v. FPC*, 455 F.2d 412, 418-20 (2d Cir. 1972).

Defendants' objections are thus reduced to the proposition that while both agencies may be required to consider approximately the same factors, the Corps is required to weigh more heavily the environmental issues, especially

those concerning preservation of wetlands. This difference in perspective is attributed to the disparity between the purposes of the statutes: the Water Power Act's prime orientation is power development while the FWPCAA's is preservation of water resources. Although this difference is not insignificant, the similarities in purpose and operation are more persuasive. The Court's duty here is to repeal the FPC's exclusive authority only if it is positively repugnant to or irreconcilable with the FWPCAA. Given the FPC's substantial environmental responsibilities, it cannot fairly be said that the difference in emphasis and perspective of the FWPCAA rises to a level sufficient to support an implied repeal. Accordingly, an exemption for FPC-licensed projects from the licensing requirements of the FWPCAA must be inferred. The Court finds that the Corps was therefore without jurisdiction to either grant or deny the permit at issue here.

An appropriate order follows.

/s/ John Lewis Smith, Jr.
United States District Judge

Dated: December 19, 1986

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA.

Civil Action No.
78-1712

MONONGAHELA POWER COMPANY,*et al.*,
Plaintiffs,

v.

CLIFFORD L. ALEXANDER, JR. LIEUTENANT GENERAL JOHN W. MORRIS, CORPS OF ENGINEERS, COLONEL MAX R. JANAIRO, JR.
Defendants,

THE STATE OF WEST VIRGINIA, THE SIERRA CLUB, WEST VIRGINIA HIGHLANDS CONSERVANCY, NATIONAL WILDLIFE FEDERATION, ENVIRONMENTAL DEFENSE FUND, THE NATIONAL AUDOBON SOCIETY,
Intervenor-Defendants.

FILED
DEC. 19, 1980
JAMES F. DAVEY, Clerk

ORDER

The Joint Motion of Plaintiffs for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, having been presented, and the Court being fully advise, this Court declares that the United States Army Corps of Engineers is without jurisdiction either to grant or deny a permit for construction of the Davis Project pursuant to 33 C.F.R. § 1344 because the Davis Project has been licensed previously by the Federal Energy Regulatory Commission which possesses exclusive jurisdiction over such projects, and

IT APPEARING that there is no genuine issue as to any material fact and that plaintiffs are entitled to summary judgment as a matter of law, it is hereby

ORDERED: that plaintiffs' motion for summary judgment be hereby granted.

/s/ John Lewis Smith, Jr.
United States District Judge
12/19/80

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1201
September Term, 1986
CA No. 78-01712

MONONGAHELA POWER COMPANY, *et al.*
v.

JOHN O. MARSH, JR. Secretary,
Department of the Army, *et al.*

United States Court of
Appeals For the District
of Columbia Circuit

FILED MAR 24, 1987

GEORGE A. FISHER
CLERK

And Consolidated Cases 81-1203, 81-1282

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg, Circuit Judges

O R D E R

The suggestion for rehearing *en banc* of appellees Monongahela Power Company, *et al.* has been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the Court in regular

active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that apellees' suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER CLERK

BY: /s/ ROBERT A. BONNER
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Bork, Silberman, Williams and D. H. Ginsburg would grant the suggestion for rehearing *en banc*.

APPENDIX D

1. Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), as amended by the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495 § 3(a), 1986 U.S. Code Cong. & Admin. News (100 Stat.) 1243

Section 4. General powers of Commission

The Commission is authorized and empowered—

* * *

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens, of the United States, or to any association of such citizens or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the nav-

igation capacity of any nivigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceeded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

2. Sections 10(a) of the Federal Power Act, 16 U.S.C. § 803(a), as amended by the Electric Consumers Protection Act of 1986, Pub. L. 99-495 § 3(b), 1986 U.S. Code Cong. & Admin. News (100 Stat.) 1243-45

Section 10. Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

(a)(1) Modification of plans, etc., to secure adaptability of project

That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e). If necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion of the license.

3. Section 23(b) of the Federal Power Act, 16 U.S.C. § 817 (1982)

Section 23(b). Projects not affecting navigable waters; necessity for Federal license

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State or municipality intending to construct a dam or other project works, across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

4. Section 301(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1311(a) (1982).

Section 301. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

5. Section 404(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1344(a) (1982)

Section 404. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

No. 86-1642

In the Supreme Court of the United States

OCTOBER TERM, 1987

MONONGAHELA POWER COMPANY, ET AL.,
PETITIONERS

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether hydroelectric projects licensed under the Federal Power Act, 16 U.S.C. 791a *et seq.*, are exempt from the requirements of Sections 301(a) and 404 of the Clean Water Act, 33 U.S.C. 1311(a) and 1344, which prohibit all discharges of dredged or fill material into the navigable waters of the United States except pursuant to permit issued by the Secretary of the Army.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 809 F.2d 41. The opinion and order of the district court (Pet. App. B1-B15) are reported at 507 F. Supp. 385.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1987. The court of appeals denied

rehearing en banc on March 24, 1987 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on April 13, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

This case concerns the application of two federal statutes, the Federal Power Act, 16 U.S.C. 791a *et seq.*, and the Clean Water Act, 33 U.S.C. (& Supp. III) 1251 *et seq.*, to the proposed construction of a pumped storage hydroelectric facility project. The Federal Power Commission (FPC), the predecessor of the present Federal Energy Regulatory Commission (FERC),[1] granted petitioners (a consortium of electric power companies) a license under the Federal Power Act (Pet. App. A4). The Corps of Engineers (Corps) denied petitioners a Section 404 permit under the Clean Water Act, 33 U.S.C. 1344, on the ground that the project would cause extensive environmental harm (Pet. App. A4). The district court held (*id.* at B1-B15) that the Section 404 permit program did not apply to the project, which the court concluded was subject to FERC's exclusive jurisdiction under the Federal Power Act. The court of appeals reversed (Pet. App. A1-A26) and upheld the Corps' Section 404 jurisdiction.

1. In 1970, petitioners applied to the Commission for a license to construct a 1,000-megawatt pumped storage hydroelectric project on the Blackwater River in the Canaan Valley of West Virginia. The project would require construction of two reservoirs—a large

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[1] See 42 U.S.C. 7172(a)(1)(A). Like petitioners (see Pet. 4 n.1), we refer to the FPC and FERC interchangeably as the "Commission" in this submission.

reservoir downstream and a smaller reservoir upstream. Water stored in the two reservoirs would inundate more than 7,000 acres of freshwater wetlands. Pet. App. A3.

a. In 1976, the administrative law judge (ALJ) in the Commission licensing proceeding denied petitioners' application for a license (Pet. App. A3). The ALJ found that the project would devastate the wetlands as a unique and diverse botanical and wildlife habitat (*id.* at A3-A4). In particular, the project would destroy one third of the wetlands, eighty percent of the bog, muskeg, and swamp forest communities, and one half of the wildlife habitat in the Canaan Valley. In addition, the project would inundate fifty acres of beaver ponds and forty miles of streams and rivers, which would decrease by sixty percent the self-sustaining brown trout fisheries in West Virginia. C.A. App. 214.

The ALJ further found (Pet. App. A4 n.8 (quoting C.A. App. 216)) that " 'none of the proposed mitigation plans appears reasonably appropriate or feasible to effectively outweigh the negative aspects inherent in the adoption of the proposed project, requiring a flooding of a considerable part of the floor of the Canaan Valley and radically changing its whole interdependent environment.' " Finally, the ALJ indicated (*ibid.*) approval of a modified project, involving a much smaller lower reservoir, which would have a much smaller adverse environmental impact (inundating only 700 acres).

b. In 1977, the Commission reversed the ALJ's decision and issued a license for the project (Pet. App. A4). The Commission described (C.A. App. 236) the proceeding as a "conflict between those favoring recreation and those favoring the environment in its present state." The Commission stated

(C.A. App. 261) that its issuance of a license was "motivated by the need * * * for pumped storage capacity and the construction of a facility which will provide substantial recreational opportunities." The Commission "recognize[d] that some botanical and wildlife resources will be destroyed," but concluded that "this can be mitigated in various ways, particularly by the dedication of additional land [by petitioners]" (*ibid.*). Finally, pursuant to its statutory mandate, the Commission concluded (C.A. App. 261, 262) that the project, as modified, would both be in the "public interest" and "be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate commerce, for the improvement and utilization of water power development, and for other beneficial uses, including recreational purposes, within the meaning of Section 10(a) of the Federal Power Act."[2]

2. Petitioners subsequently applied to the Corps of Engineers for a permit under Section 404 of the Clean Water Act, 33 U.S.C. 1344, to place dredged or fill material into navigable waters of the United States in connection with project construction (Pet. App. A4). Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), prohibits any discharge of pollutants, including dredged and fill material, into

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[2] The Commission's decision is currently the subject of three petitions for review, including one by the Secretary of the Interior, pending in the Court of Appeals for the District of Columbia Circuit. *Sierra Club* v. *FERC*, Nos. 77-1736, 77-1737, and 77-1845. The court of appeals has heard oral argument in those consolidated appeals, but has stayed further proceedings pending resolution of this case (see Pet. App. A4 n.10).

navigable waters, except pursuant to a Section 404 permit issued by the Secretary of the Army. Petitioners did not then object to the Corps' jurisdiction (Pet. App. A5).

After holding public hearings on petitioners' permit application and receiving written comments, the Corps of Engineers denied the permit (Pet. App. A4). The Corps concluded (C.A. App. 684; see Pet. App. A4) that the project as proposed "would alter and irreparably damage a significant natural resource, the Canaan Valley wetland complex." The Corps also concluded (C.A. App. 684) that "[t]here are available alternate sites which would fulfill the same electrical energy needs and which are far less damaging to the natural environment." The Corps suggested (*ibid.*) that petitioners pursue one of those alternatives.[3]

3. Petitioners filed this action in federal district court against the Secretary of the Army and certain Corps of Engineers officials. They sought declaratory and injunctive relief that hydroelectric projects licensed by the Commission are exempt from Section 404 of the Clean Water Act and accordingly that the Corps has no jurisdiction to require a permit for any

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[3] The Environmental Protection Agency (C.A. App. 606-608), the Department of the Interior (C.A. App. 441-446), and the West Virginia Department of Natural Resources (C.A. App. 686) each opposed issuance of the permit citing the destructive impact of the project on the unique combination of wetland resources in the Canaan Valley. The Corps reviewed the environmental impact statement submitted as part of the hydroelectric licensing proceeding (C.A. App. 336-440) and commissioned and received a report by a wetlands biologist evaluating the effects of the proposed project on the wetland and other resources of the valley (C.A. App. 609-649).

dredge or fill activity related to construction of the project. Pet. App. A5. The district court agreed and granted petitioners' motion for summary judgment (*id.* at B1-B15).

4. The court of appeals reversed (Pet. App. A1-A26). The court concluded (*id.* at A11) that Commission-licensed hydroelectric projects are neither expressly nor impliedly exempt from the terms of Sections 301(a) and 404 of the Clean Water Act. The court noted (Pet. App. A11) first that the terms of the Act "would seem to require a Corps permit for such discharges unless some exemption is available" and that the list of activities expressly exempted from the permit requirement by Section 404(f), 33 U.S.C. 1344(f), does not include Commission-licensed projects. The court next ruled (Pet. App. A19-A26) that such projects are not impliedly exempt from the Clean Water Act's requirements. The court reasoned (*id.* at A21) that "fidelity to the legislative scheme" of the Clean Water Act precludes any implied exemption for Commission-licensed projects because under the Federal Power Act the Commission does not, and need not, subject its license applicants to a "review under substantive standards comparable to those established pursuant to Section 404(b)(1) [of the Clean Water Act]." The court stressed (Pet. App. A23-A24 (footnote omitted)) that the Commission's guidelines, unlike the Section 404(b)(1) standards employed by the Corps, "assigned no relative weights to competing objectives."

ARGUMENT

The petition for a writ of certiorari should be denied. The petition presents no important issue of legal or practical significance, and the decision of the court of appeals does not conflict with any decision of this Court and is in accord with the only other court of appeals decision addressing the issue. For these reasons, the Commission acquiesces in the result of the court of appeals' decision and believes the petition should be denied. The Corps of Engineers believes that further review is not warranted for the additional reason that the decision of the court of appeals is correct.[4]

1. Petitioners' argument (Pet. 21-25) that the issue presented by the petition is important misapprehends the decision of the court of appeals. Contrary to petitioners' contention (Pet. 10), the court of appeals did not "strip[] the Commission of its established and substantive environmental role." The court of appeals merely concluded that the Commission does not possess *exclusive* jurisdiction over the environmental consequences of hydroelectric projects. The exclusivity ruling, moreover, does not involve an issue of broad legal or practical importance.

a. First, petitioners are mistaken in claiming that the court of appeals ruled that the Commission has no substantive authority or obligation to consider environmental factors in determining whether issuance

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[4] The Environmental Protection Agency (EPA) also has programmatic authority in the implementation of Section 404 (see 33 U.S.C. (& Supp. III) 1344(b), (c), (g), (h), and (i); Pet. App. A10-A11), as well as an overall responsibility for administering the Clean Water Act. The EPA is not a party to this case, but shares the Corps' view of the correctness of the decision below.

of a license would be in the "public interest," as required by the Federal Power Act. Certainly, neither the Corps of Engineers nor, more importantly, the Commission reads the court of appeals' decision as adopting that view. The decision instead simply rests on the court's conclusion that the respective substantive environmental roles of the Commission (under the Federal Power Act) and of the Corps of Engineers (under the Clean Water Act) are sufficiently distinct that the Commission's substantive jurisdiction should not be read as precluding that of the Corps of Engineers.

The court of appeals' decision does not therefore disturb the well-settled proposition that the Commission has the authority, indeed the duty, both to consider environmental factors in deciding whether to issue a license under the Federal Power Act's "public interest" standard (16 U.S.C. 803(a); see *Udall* v. *FPC*, 387 U.S. 428, 432-444 (1967)) and to deny a license whenever those factors tip the balance against its issuance. Petitioners' contrary suggestion rings especially hollow given that neither the agency (the Commission) whose substantive environmental mandate petitioners are purporting to protect nor the environmental organizations whose conservation interests petitioners are claiming to safeguard share petitioners' tortured reading of the court of appeals' decision.[5] Petitioners' characterization of the impor-

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[5] The Sierra Club, West Virginia Highlands Conservancy, National Wildlife Federation, Environmental Defense Fund, and National Audubon Society were parties below and have filed with this Court a joint opposition to the petition in which they similarly refute petitioners' reading of the court of appeals' decision. See Br. in Opp. 21-24.

tance of this case therefore challenges a ruling that is simply not presented by the decision below.

b. The court of appeals' ruling on exclusivity does not, moreover, present an important issue that warrants this Court's review. As a practical matter, agencies, such as the Commission and the Corps of Engineers in this case, work out their overlapping programmatic interests through memoranda of understanding that allow each agency a substantial role in the decisionmaking process. Indeed, the Commission and the Corps have entered into just such an understanding regarding their respective jurisdictions over non-federal hydropower development, which is why the Commission believes that the exclusivity issue (while wrongly decided in its view) is of little practical moment. For both agencies, this case is the infrequent instance when the fact that the two agencies had independent permitting authority to implement their distinct substantive environmental roles made a difference in the outcome to a permit applicant. It is no mere happenstance that the issue raised by the petition—whether a Corps Section 404 permit is required of Commission-licensed hydroelectric facilities—has arisen in only one other reported case during the past fifteen years in which the Federal Power Act and the Clean Water Act have coexisted.[6] Hence, although the exclusivity issue is no

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[6] Petitioners mistakenly state (Pet. 7) that the Corps did not assert Section 404 jurisdiction generally over hydroelectric projects until 1977. From the time the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, were enacted, the Corps has consistently interpreted that provision as applying to hydroelectric projects. Shortly after passage of the Amendments, the Corps proposed regulations to implement its Section 404 authority.

doubt of some financial interest to petitioners in this particular case, it is not an important legal issue that warrants this Court's review—at least in the absence of a conflict in the circuits.

2. By omission, petitioners concede that the decision of the court of appeals does not conflict with any decision of any other court of appeals. Indeed, petitioners are unable to cite even to a district court decision in another case that reached a different result. In fact, there appears to be only one other case that has raised the issue presented here, *Scenic Hudson Preservation Conference* v. *Callaway*, 370 F. Supp. 162 (S.D.N.Y. 1973), aff'd per curiam, 499 F.2d 127 (2d Cir. 1974), and the decision of the court of appeals here agrees with the rulings of both the district court and the court of appeals in that case.

In *Scenic Hudson*, the district court, like the court of appeals here, rejected (370 F. Supp. at 170) the arguments that application of Section 404 to Com-

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38 Fed.Reg. 12217 (1973). The regulations, as proposed and adopted, expressly required a Section 404 permit for any hydroelectric project that involved the discharge of dredged or fill material into navigable waters. 39 Fed. Reg. 12119 (codified at 33 C.F.R. 209.120(c)(6) (1974)). The Corps has consistently maintained this interpretation. See 33 C.F.R. 320.3(f). *Scenic Hudson Preservation Conference* v. *Callaway*, 370 F. Supp. 162, 164 (S.D.N.Y. 1973), relied upon by petitioners for their contrary assertion, states that the Corps initially took the position that Section 404 did not apply to the "Storm King project," the particular project involved in that case, but that the Corps subsequently changed position. This recital of the procedural history of the case, without further elucidation, is entitled to no weight given the Corps' otherwise consistent interpretation that Section 404 does apply to hydroelectric projects.

mission-licensed hydroelectric projects is inconsistent with the Commission's regulatory authority under the Federal Power Act and that the Commission performs the functional equivalent of a review by the Corps of Engineers (and the Administrator of the Environmental Protection Agency, see 33 U.S.C. 1344(c)) under Section 404. Like the court of appeals here, the district court also concluded (370 F. Supp. 170) that Congress did not intend to make an exception from the sweeping prohibitions and permit requirements of the Clean Water Act for Commission-licensed projects. The district court was similarly of the view (*ibid.*) that the substantive environmental mandates conferred on the Corps by Section 404 and on the Commission by the Federal Power Act are sufficiently distinct that the latter should not be read as precluding application of the former. The Second Circuit in *Scenic Hudson* affirmed (499 F.2d at 127) in a per curiam opinion based on the district court's "well-considered opinion."

3. Finally, the Corps of Engineers believes that further review is not warranted for the additional reason that the decision of the court of appeals is correct. While the Commission acquiesces in the decision below, it continues to believe the decision is incorrect and therefore opposes review only for the reasons set forth above.[7]

In the Corps of Engineers' view, petitioners' contention that Sections 301(a) and 404(b) of the

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[7] On the merits, the Commission agrees with much of the legal arguments advanced by petitioners, which are set out in their petition. For this reason, we do not separately repeat the Commission's merits argument here and we instead detail the views of the Corps of Engineers in response to the petition.

Clean Water Act do not apply to Commission-licensed hydroelectric projects fails in three fundamental respects. First, it ignores the language, structure, and legislative history of the Clean Water Act, which make plain that Congress intends for Section 301(a)'s discharge prohibition and Section 404's permit requirement to apply to those projects. Second, it misapplies and misstates congressional purpose in enacting the Federal Power Act in 1970. Finally, it misapprehends the nature of the Corps' responsibilities under Section 404, when it equates the Corps' substantial environmental mandate with that of the Commission under the Federal Power Act.

a. Contrary to petitioners' assertion (Pet. 15), the decision of the court of appeals does not rely on a "naked presumption" that Section 404 applies to Commission-licensed projects. The court of appeals' construction of Sections 301(a) and 404 was well clothed in the plain meaning of the Clean Water Act, as evidenced by its language, structure, and legislative history. As noted by the court of appeals (Pet. App. A11), the relevant statutory language nowhere suggests an exception for Commission-licensed hydroelectric projects. Sections 301(a) and 404 provide in no uncertain terms that "any discharge of dredged or fill materials into navigable waters * * * is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to [Section] 404" (*United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985)).

As the court of appeals also pointed out (Pet. App. A19-A20), the structure of the Clean Water Act similarly refutes petitioners' proffered exemption. In Section 404(f), Congress has carefully delineated the particular activities that are exempt from Sec-

tion 404.[8] Congress's failure to include Commission-licensed hydroelectric projects, or even any comparable activity, in that list is well-nigh dispositive. The legislative history of the Clean Water Act confirms, moreover, what the statutory language and structure make plain.[9] As the court of appeals recounts (Pet. App. A9-A10), the legislative history shows that Congress "recognized that some other legislative objectives would have to be reconciled with the new pollution-control efforts," and that Congress made no effort to exempt the adverse environmental consequences of hydroelectric projects from its "ef-

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[8] Section 404(f)(1) and (2) expressly exempt from Section 404's permit requirement certain minor discharges which do not bring navigable waters into a use to which they were not previously subject (33 U.S.C. 1344(f)(1) and (2)). In addition, Congress has provided for issuance of general permits in specified circumstances in lieu of individual applications (Section 404(e)(1), 33 U.S.C. 1344(e)(1)), for transfer of portions of the federal program to states (Section 404(g), 33 U.S.C. 1344(g)), and for exemptions of federal projects specifically identified by Congress (Section 404(r), 33 U.S.C. 1344(r)).

[9] Contrary to petitioners' assertion (Pet. 15), the relevant legislative history does not show that Section 404 is "intended merely to preserve some of the Corps' former jurisdiction." As recently described by this Court in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. at 133, Congress intended in the Clean Water Act, including in Section 404, "to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes." See *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317-318 (1981) ("The 1972 Amendments to the Federal Water Pollution Control Act * * * were viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation * * *. Congress' intent * * * was clearly to establish an all-encompassing program of water pollution regulation.")

fort to halt the systematic destruction of the nation's wetlands." [10]

Finally, even if the meaning of the Clean Water Act were ambiguous in this context (which it is not), the decision below would still be correct because "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress" (*United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. at 131).[11] The Corps' con-

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[10] Significantly, in 1977, Congress amended Section 404 to include two exemptions to the permitting process (Clean Water Act of 1977, Pub. L. No. 95-217, § 67(b), 91 Stat. 1600), but it took no action to nullify the *Scenic Hudson* decision. Congress exempted, inter alia, "maintenance" of currently serviceable structures such as dikes and dams (33 U.S.C. 1344(f)(1)(C)), but pointedly did not exempt new construction of such structures. It also added the exemption for federal projects specifically authorized by Congress, but only if such projects were subjected to an environmental review which included the Section 404(b)(1) guidelines. 33 U.S.C. 1344(r). The legislative history of the 1977 amendment demonstrates the exceedingly narrow exceptions Congress intended to the scope of Section 404. See Senate Comm. on the Environment and Public Works, 95th Cong., 2d Sess., 3 *A Legislative History of the Clean Water Act of 1977*, at 347-350, 416-417, 420, 470-475 (Comm. Print 1978).

[11] For this reason, petitioners err in claiming (Pet. 19-20) that the court of appeals' decision is contrary to *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1 (1976). At issue in *Train* was whether the EPA's authority under the Federal Water Pollution Control Act to control the disposal of nuclear waste encompassed materials subject to regulation by the Atomic Energy Commission under the Atomic Energy Act (Pet. App. A15). This Court upheld the federal agency's (EPA's) construction of the Act, which was based upon a "rather explicit statement of [congressional]

struction of the scope of Section 404 is longstanding (see note 6, *supra*) and reasonable "in light of the language, policies, and legislative history of the [Clean Water] Act" (474 U.S. at 131). In contrast, petitioners' proposed construction of the Act—which would "read into the [Act] a double barreled exemption, enabling them to sidestep the anti-discharge mandate of Section 301(a) and simultaneously escape the permit requirement of Section 404(a)" (Pet. App. A19)—is plainly unreasonable.

b. Petitioners make several attempts to overcome the plain meaning of the Clean Water Act and the deference due the Corps' reasonable construction of the Act. None is persuasive.

First, petitioners' reliance on congressional intent in enacting the Federal Power Act in 1920 is both misdirected and erroneous. The dispositive inquiry in this case is what Congress intended when it enacted the Clean Water Act in 1972, not what Congress intended in enacting the Federal Power Act in 1920. In any event, as the court of appeals pointed out (Pet. App. A8), the legislative history of the Federal Power Act suggests that Congress intended that the Commission's authority would be "comprehensive" only in the sense of "a consolidation of extant responsibilities." There was "certainly no preemption of subsequently-enacted legislation" (*ibid.*).

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intent to exclude AEA-regulated materials from the FWPCA" (426 U.S. at 22). Here, the responsible federal agency (Corps) has concluded that Section 404 does apply and its construction is similarly consistent with all expressions of congressional intent in the Clean Water Act. There is no comparable statement of congressional intent either on the face of the Act or in its legislative history to exclude categorically Commission-licensed hydroelectric projects from the strictures of Section 404.

Petitioners' contrary claim rests on the proposition that the application to Commission-licensees of the requirements of any subsequently-enacted federal law, administered by another federal agency, necessarily constitutes a "repeal" of the Federal Power Act. Under that theory, the Clean Water Act, and presumably any other federal environmental, health, safety, or welfare statutory requirements, would not apply to Commission-licensed hydroelectric projects. Like the court of appeals, we can not suppose that Congress intended such an extreme result in 1920. Nor is there any basis for it either in the Federal Power Act itself or in those subsequent congressional enactments, such as the Clean Water Act, in which Congress has since sought to address pressing national problems.[12]

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[12] Neither the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, nor the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495, 100 Stat. 1243, upon which petitioners rely (Pet. 12-14), provides any meaningful support for petitioners' claim. The former created the Department of Energy, replaced the FPC with FERC, and made FERC an adjunct of the Department of Energy. Read in context, the reference in the Conference Report (which accompanied that legislation) to FERC's "exclusive jurisdiction" (see H.R. Conf. Rep. 95-539, 95th Cong., 1st Sess. 75 (1977)), addresses only the finality of FERC's jurisdiction within the bureaucratic structure of the new Energy Department and indicates that FERC, rather than the new Secretary of Energy, will have sole (or "exclusive") responsibility for the functions transferred from the FPC. The report does not purport to address the wholly distinct issue, raised in this case, whether Commission-licensed projects are subject to environmental statutory requirements administered by other federal agencies. ECPA is likewise beside the point. ECPA simply increases FERC's obligation

Second, petitioners misapprehend the nature of the Corps of Engineers' statutory responsibilities under Section 404 by assuming (Pet. 17-18, 22, 25) that they are merely duplicative of the Commission's environmental review under the Federal Power Act. The Commission is required to take into account environmental considerations in its licensing proceedings, but, as Congress recently made clear in the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (see note 12, *supra*), the Commission need only give them "equal consideration" with other licensing issues. In contrast, Congress has struck the balance quite differently in the Clean Water Act. The Corps must follow guidelines promulgated under Section 404(b)(1), which impose substantially more stringent substantive limitations upon the Corps' exercise of its permitting authority.[13]

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to give "equal consideration" to environmental quality concerns in licensing proceedings (see § 3, 100 Stat. 1243-1245). Nowhere in ECPA or its legislative history did Congress indicate that ECPA's provisions were premised, as petitioners suggest, on the notion that Commission-licensed projects are categorically exempt from all other environmental statutory requirements, such as those imposed by the Clean Water Act. Significantly, moreover, in neither the Department of Energy Organization Act or ECPA did Congress suggest an intent to overrule the Second Circuit's 1974 decision in *Scenic Hudson*, which held that Commission-licensed hydroelectric projects were covered by Section 404 (see page 10, *supra*).

[13] In addition, under Section 404(c) the Administrator of the EPA may prohibit outright the use of a specific disposal site if he determines that the discharge of dredged or fill material at that site will "have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas * * *, wildlife, or recreational areas" (see 33 U.S.C. 1344(c)).

The administrative proceedings in this case illustrate the difference. The Section 404(b)(1) guidelines in effect when petitioners' permit application was pending provided that discharges of dredged material would be permitted "only when it can be demonstrated that the site selected is the least environmentally damaging alternative" (40 C.F.R. 230.5 (b)(8)(i) (1980)). In the absence of practicable alternative sites, disposal was permitted only if it would not have "an unacceptable adverse impact on the aquatic resources" (*ibid.*). Even more stringent restrictions applied to the discharge of fill material in wetlands (40 C.F.R. 230.5(b)(8)(ii) (1980)).[14]

No counterpart to the Section 404(b)(1) guidelines exists (or existed) under the Federal Power Act. Hence, although the Commission recognized that devastation to the wildlife and vegetation would result from petitioners' project (see C.A. App. 244), it concluded that the loss could be offset by various mitigation measures and by fulfilling a desire for flat water recreation in the Canaan Valley (C.A. App. 246-253, 261). Likewise, although the Commission did not dispute that the Glade Run alternative was environmentally less damaging, the Commission rejected that alternative on the ground that it would be without comparable value for fish, wildlife, or recreational uses (see C.A. App. 256). The Commission's licensing determinations accordingly

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[14] The current guidelines are at least as stringent. See 40 C.F.R. Pt. 230. See, *e.g.*, 40 C.F.R. 230.10(a) ("[N]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.").

cannot be regarded as the functional equivalent of compliance with Section 404, as the different results in the Commission's and Corps' licensing and permitting proceedings in this case so conclusively demonstrate.

In sum, the court of appeals correctly determined that where, as here, two statutes are eminently capable of coexistence, it is the duty of the courts, absent clearly expressed congressional intent to the contrary, to preserve the effectiveness of each of these statutes. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 468 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 86-1642

In The

Supreme Court of the United States

October Term, 1986

MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY,
AND WEST PENN POWER COMPANY,
Petitioners,

v.

JOHN O. MARSH, JR.,
LIEUTENANT GENERAL JOHN W. MORRIS,
COLONEL MAX R. JANAIRO, JR.,
AND COLONEL JOSEPH A. YORE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SIERRA CLUB, WEST VIRGINIA HIGHLANDS CONSERVANCY, NATIONAL AUDUBON SOCIETY, NATIONAL WILDLIFE FEDERATION, AND ENVIRONMENTAL DEFENSE FUND

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QUESTIONS PRESENTED

1. Whether the Federal Power Act granted the Federal Energy Regulatory Commission such "exclusive" authority over hydropower licensing so that the ban on discharges of pollutants in the Clean Water Act, unless in compliance with a Clean Water Act permit, does not apply to hydropower projects licensed by the Commission?

2. Whether the Court of Appeals correctly held that the Federal Energy Regulatory Commission is not bound to apply the substantive requirements of Section 404 of the Clean Water Act?

CORPORATE LISTING STATEMENT

Respondents Sierra Club, West Virginia Highlands Conservancy, National Audubon Society, and Environmental Defense Fund, Inc., are corporations subject to Rule 28.1. They do not have any affiliated corporations. The National Wildlife Federation has two subsidiaries: National Wildlife Federation Endowment, Inc. and Wildlife Publications, Inc., a dormant corporation. National Wildlife Federation also holds a majority interest in DeSoto Greetings, Inc., a Maryland corporation doing business in Baltimore, Maryland. National Wildlife Federation Endowment, Inc. also owns with Resources For The Future, Inc., a District of Columbia corporation known as Square 181, Inc., which is the general partner in the Resources and Conservation Center, Ltd. Partnership. None of the corporations listed above has any publicly traded stock.

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No. 86-1642

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Respondents Sierra Club, West Virginia Highlands Conservancy, National Audubon Society, National Wildlife Federation, and Environmental Defense Fund respectfully request this Court to

deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals reversing the District Court is reported at 809 F.2d 41 (D.C. Cir. 1987). A copy is reprinted as Appendix A to the petition. The Memorandum and Order of the District Court are reported at 507 F.Supp. 385 (D.D.C. 1980), *sub nom., Monongahela Power Co. v. Alexander*. A copy is reprinted at Appendix B to the petition.

STATUTES INVOLVED

The statutes involved are: Sections 4(e), 10(a), and 23(b) of the Federal Power Act, 16 U.S.C. §§ 797(e), 803(a), and 817; and Sections 301(a) and 404 of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(a) and 1344. The text of these statutory provisions is set forth in Appendix D to the petition.

STATEMENT OF THE CASE

Nature of the Case

Section 301 of the Clean Water Act, 33 U.S.C. § 1311, bans all discharges of pollutants into the Nation's waters unless in compliance with a permit issued under other provisions of the Act. These other provisions include Section 402, which allows the Environmental Protection Agency (EPA) to issue permits in the case of point source discharges, and Section 404, which allows the Corps of Engineers to issue permits pursuant to regulations prescribed by EPA in the case of dredge and fill discharges. Section 404 is the principal tool crafted by Congress to protect the Nation's diminishing wetlands.

Petitioners here, Monongahela Power Company and two affiliated corporations (hereafter Monongahela), applied to the Corps for a Section 404 dredge and fill permit to construct a 1000 megawatt, pumped storage, hydroelectric project in Canaan Val-

ley, West Virginia known as the Davis Project. Acting pursuant to EPA's Section 404(b) guidelines[1] and its own regulations, the Corps denied the permit because the project would have filled or flooded more than 4000 acres of valuable wetlands, and because the Corps found that there were feasible alternative projects less damaging to the wetlands which would have produced the same amount of power.

Monongahela sought judicial review of the permit denial because, among other reasons, the Federal Power Commission, now the Federal Energy Regulatory Commission (FERC)[2] had previously granted a license under the Federal Power Act to the Davis Project, which according to Monongahela, acted to oust the Corps' Clean Water Act jurisdiction. Monongahela argued that in enacting the Federal Power Act Congress intended to give the Commission such "exclusive" jurisdiction over hydro projects that subsequent, comprehensive Congressional enactments of general applicability would not apply to Commission licensed projects unless Congress specifically said so.

Ultimately, the Court of Appeals rejected Monongahela's argument, and this Petition for Certiorari followed.

Statement of the Facts

1. Canaan Valley's Wetlands

Canaan Valley is a broad, open valley perched high on the Allegheny Plateau at elevation 3200 feet. The Valley contains about 6000 acres of wetlands, accounting for about 39 percent of all the wetlands in West Virginia. (J.A. 613).[3]

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[1]EPA's Section 404(b) guidelines are regulations with the force of law, promulgated after notice and comment in the Code of Federal Regulations. 40 C.F.R. § 230, *et seq*. Congress made the guidelines binding on the Corps and permit applicants. 33 U.S.C. § 1344(b).

[2]In 1977, the powers of the Federal Power Commission were transferred to various components of the newly created Department of Energy, which includes FERC. *See* Department of Energy Organization Act, 42 U.S.C. § 7172(a).

[3]The term "J.A." refers to the Joint Appendix filed in the Court of Appeals.

The value of Canaan Valley's wetlands has been universally acclaimed. The Valley was designated a Natural Landmark in the mid-1970's, 40 Fed. Reg. 19508 (May 5, 1975), after the Department of Interior characterized the Valley as "a high, large northern valley far south of its vegetational range" ranking "with Yosemite and Yellowstone Valleys."[4] Monongahela's own expert agreed in the FERC proceeding that the Valley "is a biological treasure house,"[5] and a FERC Law Judge found that "Canaan Valley is the largest example of bog, muskeg and swamp forest communities, with an exceptional variety of botanical features, in all of West Virginia and the adjoining states."[6] (J.A. 214). FERC described the Valley as "a unique area from the ecological viewpoint." (J.A. 244).

Finally, the District Engineer in denying the Section 404 permit, found that "Canaan Valley wetlands differ from other wetland areas in West Virginia because of their large size and great species diversity," and that the "muskeg forms the largest expanse of bog type vegetation known in the Appalachian Mountains"—"one of the largest of its kind in the eastern United States." (J.A. 687).

2. The FERC License Proceeding

In 1970, Monongahela applied to the Commission for a license for the Davis Project pursuant to the Federal Power Act. The State of West Virginia and the Sierra Club intervened. An environmental impact statement was prepared, and hearings were held on contested issues before an Administrative Law Judge in 1974.

On June 10, 1975, the ALJ rendered his Initial Decision in which he denied a license to the Davis Project because of the loss of substantial wetlands. (J.A. 156). The Judge concluded that "Canaan Valley in its present state represents a rare ecological phenomenon of extraordinary educational and scientific, aesthetical and recreational values." (J.A. 214).

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[4]Evaluation of Canaan Valley, Tucker County, West Virginia For Eligibility As A Registered Natural Landmark, Dept. of Interior (Jan. 1974).

[5]Project No. 2709, FPC Transcript, Vol. 18, p. 2529.

[6]Muskeg is a sphagnum bog characteristic of wet, boreal regions, rare as far south as West Virginia. (J.A. 102).

Instead of licensing the Davis Project, the ALJ issued a license for a smaller project in Canaan Valley, known as the Glade Run alternative. The Glade Run alternative was similar to the Davis Project in most respects except that it had a drastically smaller lower reservoir—700 versus 7000 acres—and thus minimized the destruction of wetlands. (J.A. 194).

On review, the Commission reversed the ALJ and granted a license to the Davis Project. That decision, authored by then Commissioner James Watt, concluded that the recreational benefits from a large reservoir justified flooding the vast wetlands of the Canaan Valley. (J.A. 261).

While environmental issues were considered by the Commission, the key aspect of the Commission proceedings for this case is that Section 404 of the Clean Water Act played no role. Section 404 was enacted in 1972, EPA issued its Section 404(b) guidelines in 1975, 40 C.F.R. § 230, and also in 1975 the Corps of Engineers issued regulations which specifically provided that the Corps had jurisdiction over hydroelectric projects, 40 Fed. Reg. 31324 (July 25, 1975)—all well ahead of the issuance of the Power Act license for the Davis Project in 1977.

But neither Monongahela nor FERC ever identified Section 404 and its implementing regulations as applicable to the license proceeding, since Monongahela planned to seek a Section 404 license from the Corps at a later date.

3. The Corps of Engineers Permit Proceeding

On January 23, 1978, Monongahela filed an application for a Section 404, Clean Water Act permit with the Corps' District Engineer in Pittsburg. The Department of Interior, the State of West Virginia, the Environmental Protection Agency and the Sierra Club all filed extensive comments and evidence in opposition to a permit.

The Corps specifically reviewed the evidence before FERC, and concluded that the evidence with respect to Canaan Valley's wetlands was deficient. It therefore contracted with a biologist extensively experienced in wetlands to prepare a comprehensive study of the Valley. The 63 page Report submitted by Dr. H.W.

Vogelman developed considerable material about the extent, diversity, and comparable worth of the wetlands. The Report concluded that "the loss of this wetland complex would be an irreplaceable loss to West Virginia and the nation." (J.A. 49).

On July 14, 1978, the Corps of Engineers denied the permit. Specifically basing its decision on EPA's 404(b) guidelines, the Corps concluded that:

> 1. The Davis Power Project would alter and irreparably damage a significant national resource, the Canaan Valley wetland complex.
>
> 2. There are available alternative sites which would fulfill the same electrical energy needs and which are far less damaging to the natural environment.

Decision of District Engineer (J.A. 684).

4. The District Court Proceeding

Monongahela then sought to overturn in the District Court the denial of the Section 404 permit on a number of grounds. Prominent was the allegation that there is an inferred exemption to Section 404 of the Clean Water Act for hydroelectric projects subject to the licensing requirements of the Federal Power Act. After the State of West Virginia and the Sierra Club intervened as defendants, the District Court granted summary judgment for Monongahela, reaching only the jurisdictional claim based on the Federal Power Act. The District Court ruled that "an exemption for FPC-licensed projects from the licensing requirements of the FWPCAA must be inferred." 507 F.Supp. at 392.

5. The Court of Appeals Decision

The Court of Appeals reversed. 809 F.2d 41 (D.C. Cir. 1987). The Court noted Congress' intent in the Clean Water Act to address comprehensively the Nation's grave water pollution problems, and to ban all discharges unless in compliance with a Clean Water Act permit. The Court also stressed the Congressional "effort to halt the systematic destruction of the Nation's wetlands" in Section 404(a). 809 F.2d at 46. Then, in accord with this

Court's teaching that reviewing courts should defer to the administering agency's interpretation of Congressional enactments, avoid repeals by implication where possible, and reconcile statutes by giving maximum effect to each, the Court ruled that FERC licensed hydro projects must obtain a Section 404 permit from the Corps, thereby reaching the same result as the Second Circuit's prior decision in *Scenic Hudson Preservation Conference v. Calloway*, 499 F.2d 127 (2d Cir. 1974).

The Court stressed that FERC never purported to apply Section 404 to the Davis Project, and that FERC as an intervenor before the Court of Appeals advanced a theory quite different from Monongahela's position. 809 F.2d at 51, 53 n.114.

Monongahela's Suggestion For Rehearing En Banc was denied on March 24, 1987, and this petition followed.

REASONS FOR DENYING THE WRIT

There is no reason for this Court to review the decision below because it is consistent with the only other Circuit that has considered the issues presented by the petition. Both the District of Columbia and Second Circuits have agreed, without dissent, that the Clean Water Act's ban on discharges of dredge and fill material without a permit issued under Section 404 of the Act applies to hydroelectric projects licensed under the Federal Power Act. They have also agreed that application of Corps' jurisdiction to a hydro project does not effect a repeal by implication of any portion of the Federal Power Act.

Moreover, the issues raised here are not sufficiently important to warrant review because the Corps and FERC have been implementing their respective authorities for well over a decade in a harmonious manner, and have even memorialized their respective roles in a memorandum of understanding, attached as Appendix A. Thus, the Court of Appeals decision is consistent with both the Corps' long-standing interpretation of its authority under the Clean Water Act, and with years of administrative practice.

In addition, the Court of Appeals routinely applied well-established principles of statutory construction in a manner fully

consistent with this Court's rulings. The decision below follows this Court's precedents by harmonizing the Clean Water Act and the Federal Power Act in the only way that is (1) consistent with both the legislative intent and plain meaning of both statutes, (2) avoids a repeal by implication, and (3) accounts for the manner in which the Clean Water Act has been applied to other Federal regulatory programs.

Finally, the second question for which review is sought is not worthy of this Court's consideration because the Court of Appeals did not hold, as Monongahela suggests, that FERC "is not required to implement substantive environmental protections in discharging its obligation to issue hydropower licenses 'in the public interest'." (Petition at i). Rather, the Court held only that FERC is not charged by any statute with the duty to apply the specific, substantive requirements of Section 404 of the Clean Water Act, particularly as expressed in the Section 404(b) regulations promulgated by EPA.

I.

THE DECISION BELOW IS CONSISTENT WITH BOTH THE SECOND CIRCUIT'S PRIOR DECISION AND THE LONG-STANDING ADMINISTRATIVE INTERPRETATION OF THE CORPS OF ENGINEERS, THE AGENCY RESPONSIBLE FOR ADMINISTERING SECTION 404

Review is not warranted because the Circuits are in accord and because the decision is consistent with more than a decade of administrative practice of both the Corps and FERC in exercising the responsibilities imposed by both the Clean Water and Federal Power Acts.

The issues raised here were first presented to a Court of Appeals in *Scenic Hudson Preservation Conference v. Callaway*, 370 F.Supp. 162 (S.D. N.Y. 1973), *aff'd per curiam*, 499 F.2d 127 (2d Cir. 1974). In that case, first District Judge Lasker and then the Second Circuit ruled that Sections 301 and 404 of the Clean Water Act were applicable to a hydro project licensed by the

Commission. These decisions are in accord with a Court of Claims holding in a comparable case that "the Federal Power Act is not immune from effects of other subsequent acts of Congress of general application." *Appalachian Power Co. v. United States*, 607 F.2d 935, 941 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 935 (1980).

The *Scenic Hudson* case was filed within a few months of the passage of the Federal Water Pollution Control Act Amendments, enacted in late 1972, and raised the issue of the Corps' Section 404 jurisdiction for the first time. The Corps' initial, litigious reaction was to claim that Sections 301 and 404 were "inapplicable" to hydro projects. On more mature reflection in rulemaking, the Corps agreed that a Section 404 permit from the Corps is required, and so advised the court. 370 F.Supp. at 164.

The Corps has consistently maintained this position ever since. Although Monongahela asserts that the Corps began to require Section 404 permits for hydroelectric projects only after FERC granted a permit for the Davis Project (Petition at 7), this contention is factually inaccurate. The Corps adopted binding regulations in 1975 requiring Section 404 permits for such projects, nearly two years before FERC granted Monongahela a permit. 40 Fed. Reg. 31324 (July 25, 1975). In fact, the Corps proposed this regulation in May 1973, only five months after Congress enacted Section 404. 38 Fed. Reg. 12218 (May 10, 1973). This policy has remained unchanged to this day, as the Court of Appeals noted. 809 F.2d at 49 & n.81.

The decision below also lacks general significance as shown by the fact that the Corps rules on about 11,000 Section 404 applications per year.[7] The precise question here has been presented to appellate courts only twice in the 14 years since Congress enacted Section 404 and the Corps concluded that hydroelectric projects are subject to Section 404. Thus, the issue raised by Monongahela is not of particular concern to the hundreds

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[7]Office of Technology Assessment, Congress of the United States, OTA-0-206, Wetlands: Their Use and Regulation 141 (1984).

of project sponsors who must comply with Section 404 and obtain FERC permits.

This is because the Corps has effectively implemented this requirement ever since 1975. It has received willing compliance from the electric utility industry, as it did from Monongahela here, at least initially. Just as Monongahela applied for a Section 404 permit as a matter of course, so do all hydropower developers who construct under Federal Power Act licenses. Denials have been so rare that the Corps' jurisdiction has not been a matter of controversy.[8]

In recognition of this administrative practice, the Corps and FERC in 1981 entered into a Memorandum of Understanding which details the manner in which the two agencies will coordinate the exercise of their respective jurisdictions. (Attached as Appendix A). So far as we can tell, there has been no difficulty whatever in the implementation of this Memorandum. And of course, FERC has emphasized the slight importance of this case to the administration of the Federal Power Act by declining to seek certiorari.

II.

THE DECISION BELOW HARMONIZES THE COMPREHENSIVE NATURE OF BOTH THE CLEAN WATER ACT AND THE FEDERAL POWER ACT IN A MANNER CONSISTENT WITH THE PRECEPTS OF THIS COURT

The Court of Appeals was faithful to the teachings of this Court that repeals by implication are not favored and that, absent a literal conflict in the words of two enactments, federal courts

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[8]Congress has twice substantially amended the Clean Water Act since the Corps asserted jurisdiction, and its deliberations do not reflect any consideration of the issue. *See infra* at note 10.

should seek to harmonize the laws to give maximum effect to each. *E.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). *Compare* 809 F.2d at 53.

The first of the laws at issue here, the Clean Water Act, is comprehensive in nature, and prohibits all discharges of pollutants without a Clean Water Act permit. Congress has repeatedly emphasized its intent that the Clean Water Act apply to all discharges of pollutants into the Nation's waters:

> The 1972 Federal Water Pollution Control Act exercised comprehensive jurisdiction over the Nation's waters to control pollution to the fullest constitutional extent possible.

4 Leg. Hist. 708.[9]

This Court has frequently noted the pervasive nature of the Clean Water Act's scheme. *See, e.g.*, *Train v. City of New York*, 420 U.S. 35, 37 (1975) ("a comprehensive program for controlling and abating water pollution").

The Clean Water Act is quite plain. It states in Section 301(a), 33 U.S.C. § 1311(a):

> Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this title, the discharge of any pollutant by any person shall be unlawful.

Sections 301, 302, 306, and 307 provide for the establishment of effluent limitations which shall be applied to individual discharges through a permit system operated in accordance with Sections 318, 402, and 404. Thus, on its face, the only way to discharge pollutants legally is with a permit issued under these permitting provisions—Section 404 in the case of the discharge of dredge and fill material.

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[9]The legislative history of the Clean Water Act has been reprinted in four volumes, A Legislative History of the Water Pollution Control Act of 1972 and 1977, (Comm. Print 93-1), 93rd Cong., 1st Sess. (1973), (Comm. Print 95-14), 95th Cong., 2d Sess. (1978), hereafter cited "Leg. Hist."

The House Report explaining Section 301 was quite specific:

> Any discharge of a pollutant without a permit issued by the Administrator under section 318, or by the Administrator or the State under section 402 or by the Secretary of the Army under section 404 is unlawful.

1 Leg. Hist. 787.

As the Court of Appeals warned, Monongahela's contentions here would create "a double-barreled exemption" to the mandates of the Clean Water Act. 809 F.2d at 50. A hydroelectric project would escape both the ban on discharges in Section 301 and the permit requirement of Section 404. This is because there is no way for FERC to grant a Section 404 permit. It is not authorized to do so by the Clean Water Act, nor is it prepared or equipped to do so under its own procedures and regulations.[10]

Monongahela would nevertheless infer this "double-barreled exemption" in a two step process that ignores the plain language of Sections 301 and 404 and the legislative intent animating the Clean Water Act. First, Monongahela emasculates the wetlands protective thrust of Section 404 by claiming that Section 404 was designed only to preserve existing Corps' authority under the Rivers and Harbors Act, 30 Stat. 1121 (1899). Petition at 15. Second, Monongahela inaccurately posits that the Federal Power Act was designed to grant FERC "exclusive" jurisdiction over hydro projects in the sense that no subsequent Congressional enactment of general applicability could provide another overseer unless Congress specifically said so—no matter how comprehensive that

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[10]The Court of Appeals properly regarded as significant Congress' failure in 1977 to create a specific exemption from Section 404 for hydro projects licensed by FERC. 809 F.2d at 51. The *Scenic Hudson* decision, *supra*, had invited Congress to address the issue, 370 F.Supp. at 170, and the Clean Water Act amendments extensively revamped Section 404 without mentioning the problem. More significantly, Congress did exempt other activities from Section 404, including "Federal project[s] specifically authorized by Congress," but only if the Section 404(b) guidelines are considered in an environmental impact statement submitted to Congress. It is inherently incredible that Congress would exempt Congressionally authorized projects only if they undergo consideration of Section 404(b) factors, and yet intend FERC licensed projects to escape Section 404(b) review under an inferred exemption.

subsequent statute. However, the authority relied on by Monongahela does not support its argument. More importantly, Monongahela's position is contradicted by the way FERC has integrated Section 401 of the Clean Water Act into its implementation of the Federal Power Act and the way the Clean Water Act has been applied to natural gas projects licensed by FERC under the Natural Gas Act, another comprehensive regulatory scheme.

A. Section 404 Is A Comprehensive, Wetlands Protection Provision

Monongahela belittles Section 404 by urging that it "was intended merely to preserve some of the Corps' former jurisdiction, not expand it." Petition at 15. The legislative history cited to support this contention is inaccurate. To be sure, Senator Ellender offered an amendment to the bill before the Senate adding a new section numbered 404 that covered only "the discharge of dredged materials into navigable waters." 2 Leg. History at 1386.

But Senator Ellender's amendment did not become law, and it differs materially from the jurisdiction actually conferred on the Corps. As enacted, Section 404 substantially expanded Section 404 in ways that have convinced the judiciary that the Corps' authority over wetlands has been increased.

First, authority over the discharge of *fill* material was added to Section 404(a), clearly demonstrating that the section was meant not only to address the issue of *disposal* of dredged material but also discharges of fill material of the type required to create an impoundment for a hydroelectric project. Secondly, Section 404(b)(1) expressly gave EPA the authority to promulgate "guidelines," which are actually binding regulations, and mandated that the Corps follow these guidelines in deciding whether to issue permits. Third, Section 404(c) provides EPA with absolute power to veto Section 404 permits for a broad range of reasons. Nothing in the Rivers and Harbors Act gives any agency other than the Corps power to establish criteria for permit issuance or to veto Corps permits.

Contrary to what Senator Ellender intended with his unsuccessful amendment, Congress in 1972 gave the Corps and EPA substantially broader powers to control the placement of dredged and fill material into the Nation's waters than any authority conferred on the Corps by the Rivers and Harbors Act.

Given Congressional intent to protect the Nation's wetlands in Section 404,[11] there is nothing unusual about the Court of Appeals' approach to the issue presented by Monongahela. The Court of Appeals looked at the plain language of the discharge prohibition of Section 301 and the permit requirement of Section 404, examined the legislative history of the Clean Water Act, considered the overall statutory scheme of the Act to divine Congress' intent and paid deference to the Corps' interpretation of its jurisdiction. This is perfectly consistent with the countless decisions by this Court establishing the principles to be applied in statutory interpretation. *United States v. Riverside Bayview Homes, Inc.*, __ U.S. __, 106 S.Ct. 455, 461-463 (1985); *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985); *North Dakota v. United States*, 460 U.S. 300, 312 (1983).

Moreover, the Court of Appeals' conclusion that Section 404's permit requirement applies to any discharge of dredged or fill material, including those associated with hydroelectric projects, is supported by existing case law. Numerous federal court decisions

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[11]The 1977 Senate debates highlighted the expansive nature of Section 404:

> The Section 404 process is an essential tool for preventing the unnecessary degradation of water quality by discharges of dredged or fill material. Without it, critical aquatic areas including swamps, marshes, and submerged grass flats, which are such an important segment of this Nation's water resource and are essential to the preservation of migratory and resident fish, bird and other animal populations, might otherwise be irrevocably destroyed.
>
> The lasting benefits that society derives from coastal and inland wetlands often far exceed the immediate advantage their owners might get from draining or filling them; we are losing wetlands at the rate of some 300,000 acres per year. The committee recognizes the need for a program which regulates the discharge of dredged or fill material into our waters and wetlands.

4 Leg. Hist. 644.

have addressed the issue of Section 404's jurisdictional scope. *E.g.*, *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984); *Avoyelles Sportmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *United States v. Texas Pipe Line Co.*, 611 F.2d 345 (10th Cir. 1979); *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). Only one published decision (save for the one corrected by the Court of Appeals) has ever held that a discharge literally within the terms of Section 404(a) and not expressly exempted by some other provision of Section 404 falls beyond the Corps' regulatory authority. That one case was reversed by a unanimous decision of this Court. *United States v. Riverside Bayview Homes, Inc.*, __ U.S. __, 106 S.Ct. 455 (1985).[12]

In short, Monongahela cannot dodge Section 404 by claiming that Section 404 simply reenacted the Corps' preexisting authority.

B. The Authority Relied on By Monongahela Does Not Support Its Position

Monongahela advances several arguments in support of its claim that FERC has "exclusive" jurisdiction over hydro projects. None have merit.

First, the Power Act was not enacted to bar all future regulation by any entity but FERC. Rather, its purpose was to place the then balkanized Federal regulation of hydro projects into one agency. While Congress was surely exercising the full extent of its Commerce power to the exclusion of the states, *First Iowa Hydro-*

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[12]Although most of these cases, including *Riverside Bayview*, considered the scope of Section 404 authority over wetlands as "navigable waters," the controlling principle is the same as the one invoked by the Court of Appeals. The Clean Water Act represents a conscious effort by Congress to create broad, far-reaching federal regulatory authority over specified types of discharges into the Nation's waters and unpermitted discharges are strictly prohibited unless expressly exempted. *See, e.g.*, *Riverside Bayview*, *supra*, 106 S.Ct. at 462. Monongahela cannot and does not argue that the type of discharge necessary to create the Davis Project fails to come within the terms of Section 301's blanket ban of unpermitted discharges, or that it comes within any express exemption in Section 404.

Electric Coop v. *FPC*, 328 U.S. 152 (1946), it was not constraining itself from future regulation of hydro projects. The legislative history of the Power Act is replete with references to the effect that Congress was intent on centralizing only existing authority in a single agency. The purpose of the Power Act was set forth explicitly as:

> [To coordinate] the activities of the three departments which have to do with water power, in order that whatever is done by existing agencies may be done under a consistent plan with a definite end in view that there may be no duplication of work, overlapping of functions, or conflict of authority.[13]

Second, this Court's decision in *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976), rather than supporting Monongahela, stands squarely for the proposition that facilities regulated by Federal agencies with "comprehensive" and "pervasive" regulatory authority are nevertheless subject to the permit requirements of the Clean Water Act. This is because the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, like the Federal Power Act, vests in the Atomic Energy Commission (now the Nuclear Regulatory Commission) a "comprehensive regulatory scheme" over nuclear generating stations. 426 U.S. at 4. But despite this parallel "comprehensive regulatory scheme," the issue addressed by the Supreme Court was not whether the AEC had "exclusive jurisdiction" over all permitting matters relating to nuclear plants licensed by the AEC. Rather, the issue was whether the discharged "nuclear materials are 'pollutants' within the meaning of FWPCA." 426 U.S. at 4. This is an issue this Court never needed to reach if the AEC had "exclusive jurisdiction" in the sense that no other agency could issue permits for the plant.

But this Court did undertake an analysis of the Clean Water Act to determine whether source materials, by-products, and special nuclear materials are pollutants within the meaning of the Clean Water Act. It found specific statements and direct evidence in the legislative history that Congress did not intend these three types of nuclear pollutants to be subject to EPA permits.

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[13]Water Power Hearings before the House Water Power Committee, 65th Cong., 2d Sess. at 26 (1919).

The key aspect of *Colorado PIRG* for this case is that the nuclear plant involved there, and other nuclear plants, discharge other pollutants which are in fact subject to Clean Water Act permits. EPA has specific regulations that cover the discharge of radium and accelerator produced isotopes, 40 C.F.R. § 122, p. 60 (1986), and these, as well as other pollutants such as blow down water from cooling towers, are in fact subject to Section 402. *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978), *cert. denied*, 439 U.S. 824 (1978).

Third, the Department of Energy Organization Act of 1977 did not confirm that FERC has "exclusive jurisdiction" over hydro projects to the exclusion of all other Federal agencies. Petition at 13. Monongahela cites a fragment of a sentence in the Conference Report. But in the context of the entire Conference Report and in light of Congress' objectives in the DEO Act, the "exclusive jurisdiction" referred to in the Conference Report was simply exclusive jurisdiction to grant licenses *under the Power Act*, without interference or further review by the Secretary of Energy or other federal executives. The need for the statement in the Conference Report stemmed from a concern that the Secretary of Energy might somehow become involved in FERC's Power Act functions. The DEO Act took the Power Act duties previously performed by an independent agency, the FPC, and transferred them to FERC, an agency within the Department of Energy and, at least organizationally, subordinate to the Secretary. Congress' concern is reflected in the passages in the Conference Report immediately following the statement relied on by Monongahela. H.R. Conf. Rep. No. 539, 95th Cong., 1st Sess. 76, reprinted in 1977 U.S. Code Cong. & Adm. News 947. It is further reflected throughout the legislative history, including the floor debates. *See, e.g.*, 123 Cong. Rec. 26114, Col. 1 (Aug. 2, 1977) (remarks of Cong. Dingell).

The Report reflects Congress' intent that FERC have the same jurisdiction as the FPC previously had—no more and no less. This is why the Conference Report states that FERC gets the Power Act licensing functions of the FPC and that others cannot interfere with those functions, and why it does not say that other federal agencies

acting under statutes other than the Power Act are prohibited from carrying out their statutory duties.[14]

Finally, Monongahela claims the recent passage of the Electric Consumer Protection Act of 1986 (ECPA), Pub. L. No. 99-495, 100 Stat. 1243 (1986), is "an express reaffirmation" of the view that FERC is the sole agency responsible for reviewing hydro projects under environmental requirements, and chastizes the Court of Appeals for not discussing ECPA. Petition at 13-14.[15] To the extent ECPA is relevant, it confirms that Congress has finally lost patience with FERC's implementation of the policies embedded in the Nation's environmental laws, and would not entrust sole administration of the Clean Water Act to a "prodevelopment" agency. *See* remarks of Cong. Dingell, 132 Cong. Rec. H. 8955 (Oct. 2, 1986); H.R. Rep. 99-934, 99th Cong., 2d Sess. 23-26 (1986).

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[14]FERC's implementation of its Natural Gas Act authority, also transferred to it under the DEO Act, refutes Monongahela's expansive reading of the words "exclusive jurisdiction" in that Act. Section 301 of the DEO Act, 42 U.S.C. § 7151(b), transferred all the functions of the FPC to the Secretary of Energy, except those functions delegated to FERC in Sections 401-408. It is one of these sections, Section 402(a), 42 U.S.C. § 7172(a), which transferred to FERC authority to issue Federal Power Act licenses for hydroelectric projects, and which the Conference Report referred to as embodying the "exclusive jurisdiction" of the Commission.

But Section 402(a) also transferred to FERC certain of the FPC's functions under the Natural Gas Act, including for example the issuance of a certificate of public convenience and necessity under Section 7 of that Act. Yet no one could seriously contend that FERC has "exclusive jurisdiction" over natural gas facilities in the sense Monongahela argues that FERC has exclusive jurisdiction over hydroelectric facilities. To be sure, the Natural Gas Act creates a rather comprehensive regulatory scheme. But there is also regulation by other federal agencies, and even the states. For example, the Economic Regulatory Administration in the Department of Energy has authority under Section 3 of the Natural Gas Act to authorize the import of gas for FERC approved facilities, thus giving ERA an effective veto over some projects. 42 U.S.C. § 7172(a). EPA and the States also issue Clean Water Act permits to natural gas facilities licensed by FERC. *See infra* at 20.

[15]Monongahela's recent emphasis on ECPA is surprising since Monongehela did not deem ECPA important enough at the time of enactment to call it to the Court of Appeals' attention under Federal Rules of Appellate Procedure, § 28j.

ECPA admonishes FERC to upgrade its consideration of environmental values in licensing proceedings. ECPA, Section 3, 16 U.S.C. §§ 797(e), 803(a)(j). ECPA never mentions EPA and the Corps, the agencies responsible for water pollution control, does not address water pollution or Section 404, and simply has no relevance to the issues presented in the petition. This Court has often admonished that subsequent legislation cannot alter the meaning of prior legislation when it does not address that prior legislation. *See St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 785-788 (1981).

C. Monongahela's Position Is Inconsistent With The Way The Clean Water Act Has Been Applied In Comparable Situations to Facilities Subject to FERC's Jurisdiction Under the Federal Power Act and the Natural Gas Act

Section 401 of the Clean Water Act provides that no Federal license or permit to conduct an activity that creates a discharge may be granted unless a water quality certificate has been obtained from the pertinent state. 33 U.S.C. § 1341(a). The language of Section 401(a) is comprehensive, applying on its face to all applicants for a Federal license or permit. There is no specific statement in the language of Section 401(a) that Congress wanted Section 401(a) to apply to applicants for Power Act licenses. As a result, FERC has routinely imposed this requirement on its applicants for Power Act licenses, *e.g.*, 50 Fed. Reg. 32229 (Aug. 9, 1985), and FERC's brief below conceded applicability. See Brief for Intervenor-Appellee Federal Energy Regulatory Commission (hereafter "FERC Br.") at 25 (Nov. 16, 1981). Monongahela complied with Section 401(a) by obtaining a Section 401(a) water quality certificate from the State of West Virginia. (J.A. 437-440, 686).

Section 301's ban on discharges without a permit is equally comprehensive. There is simply no basis in the language, legislative history, or policies of the Clean Water Act for suggesting that Power Act applicants must obtain a Section 401(a) certificate, but not a Section 404 permit which allows them to escape the ban on

discharges in Section 301. Monongahela offers no reason for ignoring the plain language employed by Congress in the Clean Water Act other than its repetitious and unilluminating reference to the Power Act as a "comprehensive statutory scheme."

Similarly, as noted in Section B above, FERC also administers the Natural Gas Act, 16 U.S.C. § 717, *et seq.*, "a comprehensive scheme of federal regulation" over the interstate transmission of natural gas. *See Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, 91 (1963). Nevertheless, natural gas pipelines must routinely apply for Section 402 and 404 permits for the discharges caused by the construction of the pipelines. 18 C.F.R. § 157.206(d)(2)(i). The applicant for the most controversial pipeline project currently pending before FERC has recently filed an application for a Section 404 permit with the Corps.[16]

The Court of Appeals decision properly reconciles this administrative practice with both the Clean Water Act and the Federal Power Act.[17]

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[16]*See* Iroquois Gas Transmission System, Natural Gas Pipeline Request for Department of the Army Permit, File 25.22.02.04-05/06, before U.S. Army Corps of Engineers, New York Division (March 11, 1987).

[17]Monongahela cites with alarm a recent District Court ruling that a hydro project discharging tons of dead fish parts is required to obtain a Section 402 discharge permit. Petition at 20. Not only is *National Wildlife Federation v. Consumers Power Co.*, No. G85-1146 (W.D. Mich. March 31, 1987), correctly decided, it is an exceedingly narrow ruling limited by the court to its own facts.

III.

THE COURT OF APPEALS DID NOT RULE THAT FERC HAS NO SUBSTANTIVE ROLE UNDER THE NATION'S ENVIRONMENTAL LAWS; RATHER, IT CORRECTLY RULED ONLY THAT FERC IS NOT BOUND, AND DID NOT IN THIS CASE APPLY, THE SUBSTANTIVE REQUIREMENTS OF SECTION 404

The second issue raised by Monongahela's petition purports to challenge a ruling that the Court of Appeals never made. According to Monongahela, the Court of Appeals ruled that FERC has no substantive environmental role in the issuance of hydropower licenses. Petition at 21. In fact, the Court of Appeals made no such ruling. Rather, it held that FERC does have a duty to account for environmental considerations and policies in the balancing process that informs FERC licensing. 809 F.2d at 52. The Court of Appeals ruled only that "the explicit conservation-oriented Section 404(b)(1) directives under which the Corps labors have nowhere been matched in the mandate given FPC." 809 F.2d at 52.

Therefore, the second question presented in Monongahela's petition is not properly before this Court.

With respect to the narrow issue actually decided by the Court of Appeals—that FERC is not bound by Section 404—Monongahela cannot identify a single case or other authority for the proposition that FERC is obligated to follow the specific, substantive requirements of the Clean Water Act. As conceded by Monongahela, the cases it relies on, most prominently *Udall v. FPC*, 387 U.S. 428, 437-444 (1967), hold only that FERC's "public interest" standard must be evaluated "with reference to the contemporary national environmental policies established by Federal laws." Petition at 22.

Moreover, FERC's theory as an Intervenor in the Court of Appeals is at odds with a specific duty under Section 404. There, FERC insisted it had "exclusive" authority over hydro projects under the Federal Power Act, and that it has "environmental

protection obligations under Section 10(a) of the Federal Power Act" and the National Environmental Policy Act, 42 U.S.C. § 4321; but FERC never once suggested that it was bound to apply the substantive requirements of Section 404. *See* FERC Br. at 27-29. In supplemental briefing specifically requested by FERC, the Commission urged that hydroelectric projects were subject to the Clean Water Act only in a two-step review process. First, the states perform a review under Section 401 of the Clean Water Act "to insure that the discharge will comply with all water quality standards."[18] The second review is performed by the Commission under the Federal Power Act and "involves a balancing of all factors relevant to a determination that the activity as proposed best serves the public's interest." Supplemental Memorandum of the Federal Energy Regulatory Commission, at 2 (July 2, 1982). As the Court of Appeals observed, Section 404 plays no role in this analysis. 809 F.2d at 49.

The most noteworthy aspect of FERC's position below is that it confirms the Court of Appeals' view that FERC is bound only to engage in a balancing process. Thus, FERC's view of its responsibilities is totally at odds with Monongahela's position that FERC is bound to apply the substantive Section 404 criteria.

FERC's conduct in the Monongahela licensing proceeding also belies Monongahela's view that Federal Power Act permits are issued by FERC in accord with Section 404 and EPA's implementing regulations, which in turn must be based on the effects of the discharge on, among other things, health, wildlife, aesthetics, recreation, and other environmental protection matters. 33 U.S.C. §§ 1344(b), 1343(c). The Section 404(b) regulations in force at the time this case was reviewed by FERC were even more specific in imposing substantive standards that go beyond the requirements of

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[18]Section 401(a) of the Clean Water Act requires "any applicant for a Federal license or permit" which may result in a discharge of pollutants to obtain a certificate from the pertinent State that the discharge will comply with specified water quality provisions of the Act. A license may not issue if a certificate is denied.

the Power Act and NEPA. 809 F.2d at 50, n.100. The regulations initially admonished that "the guiding principle should be that destruction of highly productive wetlands may represent an irreversible loss of a valuable aquatic resource." 40 C.F.R. § 230.4-1(a)(1) (1978).[19]

The regulations also imposed a burden on applicants not imposed by the Federal Power Act:

> Discharge of fill material in wetlands shall not be permitted unless the applicant clearly demonstrates the following:
>
> (a) The activity associated with the fill must have direct access or proximity to, or be located in, the water resources in order to fulfill its basic purpose, or that other site or construction alternatives are not practicable; and
>
> (b) That the proposed fill and the activity associated with it will not cause a permanent unacceptable disruption to the beneficial water quality uses of the affected aquatic ecosystem, or that the discharge is part of an approved Federal program which will protect or enhance the value of the wetlands to the ecosystem.

40 C.F.R. § 230.5(b)(8)(ii) (1978).

Here, FERC did not perform the kind of Section 404 review mandated by the Clean Water Act and EPA's regulations. FERC's environmental impact statement does not mention Section 404, does not identify the fill required, and is extremely cursory in its treatment of wetlands. (J.A. 336, 345). The EIS does not, for example, attempt to compare the magnitude and diversity of the Canaan Valley wetlands with other wetlands in the Eastern United States. And of course, the Section 404(b) regulations were not mentioned or applied, even though they in fact were promulgated before the license here issued. *See* 40 Fed. Reg. 41292 (Sept. 5, 1975).

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[19]EPA's current Section 404(b) regulations contain comparable prescriptions. *See* 40 C.F.R. § 230.10(a) (1986).

The truth of the matter is that in considering the Davis Project, FERC had no notion that it would have the kind of responsibility assigned to it by Monongahela. No one claims that FERC performed a Section 404 review or applied the criteria in EPA's regulations, only that it conducted a general environmental review under other statutes.

By contrast, the Corps took its Section 404 responsibilities seriously. Its entire review of Monongahela's permit application emphasized the Canaan Valley's wetlands. It commissioned a specific study to determine their extent and value in comparison to other wetlands, a step FERC never considered. And its decision was based on the value of these outstanding wetlands, as mandated by the Section 404(b) guidelines.

Ultimately, if the Section 404(b) regulations are applicable to the Davis Project, the decision to issue a permit to fill Canaan Valley's wetlands should have turned on whether there was a practicable alternative available. That criterion informed the Corps' decision when the Corps found that the Glade Run alternative could minimize the destruction of wetlands. It did not inform the FERC decision even after the Administrative Law Judge had found Glade Run to be a practicable alternative. FERC made no finding that Glade Run was not practicable. Rather, it engaged in its usual balancing process and elevated recreation over wetlands in selecting the Davis Project. (J.A. 224-256.)

Thus, not only was the Court of Appeals correct that FERC is not bound by Section 404 and its implementing regulations, it was also correct in observing that in this case FERC in fact did not apply Section 404.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

MEMORANDUM OF UNDERSTANDING BETWEEN THE

FEDERAL ENERGY REGULATORY COMMISSION AND THE DEPARTMENT OF THE ARMY

REGARDING

NON-FEDERAL HYDROPOWER DEVELOPMENT

In the interest of mutual cooperation for expediting non-Federal hydropower development, the Federal Energy Regulatory Commission, hereinafter referred to as the Commission, pursuant to the authority contained in the Federal Power Act, as amended; 16 U.S.C. Sec. 791 a *et seq*, and the Department of the Army hereinafter referred to as the Army, pursuant to the interdepartmental work provision of 47 Stat. 417 (31 U.S.C. Section 686), enter into this Memorandum of Understanding (MOU);

WHEREAS, the Commission is responsible for issuing preliminary permits and licenses to non-Federal entities for the development of hydroelectric power plants under its jurisdiction, including power plants utilizing Federal dams where Congress has not authorized power development as a project purpose.

WHEREAS, the U.S. Army Corps of Engineers, hereinafter referred to as the Corps has constructed water resources projects throughout the nation where a potential exists for the development of hydroelectric energy and is agreeable to the development of hydropower by non-Federal entities, provided that in any license issued by the Commission, hydroelectric development is found by the Commission to be compatible with the purposes for which Congress authorized the project, and provided Federal hydroelectric facilities have not been authorized by Congress for construction;

WHEREAS, the Army has certain regulatory responsibilities and the Army and the Commission wish to take all possible steps to reduce regulatory burdens and minimize duplication of Federal review;

WHEREAS, both the Commission and the Army wish to encourage non-Federal hydropower development;

PART I

NOW THEREFORE, in consideration of mutual cooperation and the encouragement of developing renewable resources by the promotion of hydroelectric energy at existing and future Corps' facilities, the Commission and the Army agree to the following:

1. Feasibility Study of Hydropower Potential

a. The Commission will require, in its preliminary permits authorizing feasibility studies of a facility at a Corps of Engineers' dam that the Permittee coordinate those studies for a proposed project with the appropriate Corps' District Engineer. This is to ensure that the feasibility studies will result in a plan of development consistent with the authorized purposes including operations, of the Federal project.

b. At the initial meeting between the Corps and the Permittee, which shall be requested by the Permittee, the Corps will provide to the Permittee all pertinent general information as is available on: status and content of District's studies relating to hydropower; physical constraints at the Corps facilities relating to hydropower development; requirements for design, construction, and hydraulic model studies, if necessary; requirements to avoid adverse impact on other project purposes; and other items or conditions that may affect the Permittee's studies for the proposed power plant. The Permittee shall be responsible for conducting, at its own expense, all necessary technical studies and documentations, including reports, drawings, etc. in such scope and detail that are needed to confirm technical and operational feasibility of a proposed power plant at a Corps' site.

2. Design, Construction and Operation

a. The licensed hydropower facilities that will be an integral part of or that could affect the structual integrity or operation of the Corps' project shall be designed and constructed in consulta-

tion with and subject to the review and approval of the appropriate Corps' District Engineer.

b. The Corps' approval of the final design with regard to impact on navigation will be exercised under Section 4(e) of the Federal Power Act for all proposed non-Federal hydropower facilities at the Federal site.

c. The Commission will require Licensees to reimburse the Corps directly for all reasonable costs associated with the Corps' review and approval of the design and construction, plans and specifications, and the inspection of construction, cited in paragraph 2a and 2b above, for power development at Corps' projects, provided that charges shall not be assessed for information, services, or relationships that would normally be provided to the public. The Corps will bill the Licensee for costs directly related to the review of design and construction of those licensed facilities that affect the integrity or operation of the existing project structures. Disagreement by either the Licensee or the Corps regarding reimbursement will be referred to the Director, Office of Electric Power Regulation or successor office, hereinafter (OEPR) for resolution. Such reimbursable costs shall be limited to those associated with design approval and construction, and shall not include those costs related to commenting on permit and license applications pursuant to Section 4(e) of the Federal Power Act. Licensee shall comply with 16 U.S.C. Sec. 804 and all such other provisions of the Federal Power Act as may be appropriate.

d. Copies of all correspondence between the Licensee and the Corps regarding the schedule and progress of the design review and approval will be provided to the Commission's appropriate Regional Engineer. The Regional Engineer will not authorize construction of the facility to start until the Corps' District Engineer's written approval of the construction plans and specifications has been received by Regional Engineer or his designee.

e. The Commission's Regional Engineer will be responsible for surveillance of the construction activities within the licensed project boundary. The Licensee's proposed construction inspection program will be furnished to the Corps for review and comment prior to approval by the Regional Engineer. The con-

struction of the facilities will be inspected by the Regional Engineer's staff during construction of the project, generally at monthly intervals. Copies of the reports of these inspections will be furnished to the Corps. The Corps shall perform periodic or continuous inspections at critical stages of the construction of those portions of the licensed project works that, in the judgment of the Corps, may affect the integrity or operation of existing project structures. A schedule or Corps' proposed inspections will be furnished to the Regional Engineer. The Regional Engineer and the Corps shall take all necessary steps in coordination to avoid duplication of inspections. Copies of the Corps' inspection reports will be furnished to the Regional Engineer within 30 days of the date of inspection. However, the Corps reserves the right to enter the construction site at any time to perform an inspection. Any construction deficiencies or difficulties detected by the Corps' inspections will be immediately reported to the Regional Engineer Upon review, the Regional Engineer will refer the matter to the Licensee or appropriate action. The Corps' inspector will report to the Regional Engineer or his representative regarding the need to stop construction while awaiting resolution of construction deficiencies or difficulties if such deficiency or difficulty would affect the integrity of existing project structures. In cases when construction practice or deficiency may result in an imminent danger to the integrity and safety of the existing project, the Corps inspector has the authority to stop construction while awaiting the resolution of the problem.

f. The completed licensed facilities will be inspected periodically by the Regional Engineer's staff to determine that the facility is being properly operated, maintained, and administered in conformance with license conditions. Copies of the reports of these inspections will be furnished to the Corps within 30 days of the date of inspection.

g. Portions of the licensed project works that may affect the integrity and operation of the Corps' project will be inspected and evaluated by the District Engineer as a separate item under the Corps' Periodic Inspection and Continuing Evaluation of Completed Civil Works Structures Program. Copies of the reports of these inspections will be furnished to the Regional Engineer within

30 days of the date of inspection. The Corps and the Commission will take all necessary steps in coordination to avoid duplication of inspections.

h. The Commission will require that the Licensee will assist the Corps District office by integrating the operation of the licensed hydroelectric facility into the Corps' emergency action plan.

i. In the interest of hydropower operation compatible with other authorized functions of the Federal project, the Commission, upon recommendation by the Corps, will require the Licensee to enter into a memorandum of agreement with the Corps describing the mode of hydropower operation acceptable to the Corps. The Regional Engineer shall be a party to these decisions. This memorandum of agreement shall be subject to revision by mutual consent of the Corps and Licensee as experience is gained by actual project operation. Should the Corps fail to reach an agreement with the Licensee, the matter will be referred to the OEPR for resolution. Copies of the signed memorandum between the Corps and the Licensee and any revision thereof shall be furnished to the OEPR and the Regional Engineer.

3. Access to the Project

The Commission will require the Permittee or Licensee to coordinate the development of its plans for access to the site during site investigation, construction, and operation with the Corps.

4. Annual Charge for the Use of Government Facilities

a. Pursuant to Section 10(e) of the Federal Power Act, the Commission is required to assess a reasonable annual charge for use of the Corps' facilities.

b. The Commission is considering the issuance of a rulemaking to establish a methodology for determining annual charges for use of government facilities. The Commission will seek the comments and recommendations of the Corps in the selection of the methodology for determination of the annual charges.

5. Coordination with the Commission on Corps' Regulatory Requirements Under Section 10 of the River and Harbor Act of 1899

a. The Corps' Section 10 requirements for power related activities are met through the Commission's licensing procedure including insertion of terms and conditions in the license in the interest of navigation. Section 4(e) of the Federal Power Act requires approval of plans by the Secretary of the Army from the standpoint of interests of navigation. This authority was delegated by the Chief of Engineers to respective Corps' Division Engineers on September 5, 1980.

PART II

NOW THEREFORE, to the extent that the Corps has responsibility under the provisions of Section 404 of the Clean Water Act, for projects under the Commission's jurisdiction, and with respect to the Commission's responsibility under the Federal Power Act, the Commission and the Army further agree to the following:

1. Lead Agency for Environmental Processes

a. If a Commission action involving an application for hydropower license or amendment thereto requires the review and approval by both the Corps and the Commission, the Commission will be the lead agency for environmental documentation pursuant to the procedures set forth below.

b. As soon as practicable within the licensing process involving the need for a Department of the Army permit, the Commission staff will advise the Corps of its environmental analysis. The evaluation by the Commission of impacts upon the environmental analysis. The evaluation by the Commission of impacts upon the environment of all reasonable alternatives will to the maximum extent legally possible satisfy the requirements of both the Commission and the Corps. The Corps will to the maximum extent legally possible accept Commission resolution of issues raised during the environmental processing in order to eliminate further review of such issues during the Corps' permit process.

c. The Commission will be responsible for environmental documentation which will demonstrate, where applicable and required by law, compliance with Federal environmental statutes.

d. As the lead agency, the Commission staff will:

(1) Determine whether a proposed license action is a major Federal Action significantly affecting the quality of the environment, or is "categorically excluded" from environmental documentation or is otherwise excluded from environmental requirements.

(2) When the Commission staff determines that the preparation of an EIS or an environmental assessment is necessary, it will coordinate with the Corps to ensure that such environmental documentation adequately covers the portion of the work requiring a Department of Army permit.

(3) Provide a copy of draft environmental documentation to the Corps for its information/comment.

(4) Attempt to resolve environmental issues raised in the draft environmental documentation prior to the approval of the final environmental documentation, or, if issues are not resolved, the lead agency position will to the maximum extent legally possible be accepted by the Corps.

(5) Provide the Corps with a copy of the final environmental documentation at the time the document is issued.

(6) To the maximum extent permitted by law and applicable regulations, the Corps will accept FERC's findings on all environmental and regulatory matters on activities requiring a Department of the Army permit.

2. Cooperating Agency

a. When an application requires both a FERC license and a Department of Army permit and the Commission determines that the project will require an EIS, the Corps will be provided an opportunity for input as a cooperating agency to ensure consideration of and compliance with its responsibilities in connection with the Clean Water Act.

b. To the maximum extent permitted by law and applicable regulations, the Department of the Army officials conducting their review will accept the Commission's determination regarding the public interest.

3. Public Hearings

Where public hearings are required by the Commission and the Corps, such hearings shall be conducted jointly unless such joint hearings are not feasible.

4. Department of the Army Permit

a. When review by the Corps is required by law, it will be limited to the geographic vicinity of the specific activity requiring a Department of Army permit. Unless required by law and applicable regulations, such review will not duplicate activities of any other Federal or State agency having jurisdiction on certain matters which otherwise might be reviewed by the Corps.

b. The Commission will inform the Corps at the time it receives an application for a FERC permit or license so that the Corps may evaluate whether or not a Department of the Army permit is required. If such an Army permit is required, the Corps will immediately notify the applicant.

c. Substantive comments relative to the Corps' public interest review will be furnished to the Commission and the applicant at the earliest possible date.

d. Unless precluded as a matter of law or procedures required by law, the Corps will issue any required public notice not later than fifteen days after receipt of all information required to complete the application for the preferred action.

e. Unless required by law and applicable regulation, the Corps will not insert special conditions in its permits without first consulting with the Commission concerning its conditions and will not duplicate effects of the Commission nor duplicate Federal, state, or local law or programs.

f. To the maximum extent practicable, the Corps will take action on its permit application not later than 90 days after

public notice is issued. The duration of the Department of the Army permit will be commensurate with the expected completion date of the proposed activity and the Corps will consult with the Commission prior to establishing necessary dates.

5. General Permits

The Corps has found the practice of issuing general permits on both a regional and nationwide basis to be an effective way to reduce duplication, paperwork, and delays. The Commission and the Corps agree to cooperate with this program to the extent that a Corps permit is required. To assist the Corps in its general permit program, the Commission staff will advise the Corps of potential cumulative impacts that may occur as a result of activities authorized by the Commission. The Commission staff will also assist the Corps in its program to develop additional general permits for the Commission's authorized activities.

PART III

NOW THEREFORE, the Commission and the Army further agree to the following:

1. Procedures for Exchange of Information Between the Corps and FERC

The Commission and the Corps will establish procedures as may be necessary to coordinate their activities and to keep each agency fully informed on the activities of the other.

2. Effective Date and Modification

This MOU shall become effective on the last signature date below, and shall remain in effect until it is terminated or renegotiated upon request by either party. If either party finds that its terms need to be modified or amended, the other party shall be notified in writing of the specific change(s) desired, with proposed language, and the reason(s) therefore. A proposed change shall become effective upon written mutual consent of both parties, and shall become a part of this MOU.

3. This MOU extends only to the specific issues enumerated herein and does not apply to other program responsibilities of the Corps of Engineers, the Department of the Army, or the Commission.

The above conditions are approved.

/s/ C. M. BUTLER	/s/ WILLIAM R. GIANELLI
Chairman, Federal Energy Regulatory Commission	Assistant Secretary of the Army (Civil Works)
2 Nov. 81	November 2, 1981
(Date)	(Date)

No. 86-1642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY,
and WEST PENN POWER COMPANY,
Petitioners,

v.

JOHN O. MARSH, JR.,
LIEUTENANT GENERAL JOHN W. MORRIS,
COLONEL MAX R. JANAIRO, JR.,
and COLONEL JOSEPH A. YORE,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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REPLY MEMORANDUM OF PETITIONERS

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JOHN O. MARSH, JR., LIEUTENANT GENERAL JOHN W. MORRIS, COLONEL MAX R. JANAIRO, JR., AND COLONEL JOSEPH A. YORE,

Respondents.

REPLY MEMORANDUM OF PETITIONERS

Does the Federal Energy Regulatory Commission have exclusive jurisdiction to determine, as required by Section 10(a) of the Federal Power Act, whether a hydroelectric project is "best adapted" to a "comprehensive plan" in the public interest, or are its decisions pursuant to this Congressional mandate to be subject to veto by other federal agencies such as the United States Corps of Engineers and the Environmental Protection Agency? This is the question to which petitioners seek an answer from this Court.

Two federal agencies, the Federal Energy Regulatory Commission ("FERC") and the United States Corps of Engineers, remain of opposite view on this question. FERC believes that it has exclusive jurisdiction under the Federal Power Act to decide whether a hydroelectric project is in the public interest and should be licensed. The Corps be-

lieves that it is entitled under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (the "FWPCA") to veto a FERC hydroelectric license and to impose its view of the public interest on FERC. The United States' brief in opposition filed on behalf of both FERC and the Corps attempts to patch over these diametrically opposite positions, in part by pointing to a 1981 memorandum of understanding between FERC and the Corps which ignores the alleged powers of a third federal agency, is by its terms useless if the agencies are not in agreement, and is at odds with the agencies' respective characterizations of their own roles.

Because the conflict in roles and powers of FERC on the one hand and the Corps and EPA on the other in licensing hydropower projects has not been resolved, uncertainty and litigation have resulted and neither of these important federal statutes is being implemented in the way Congress intended. Entirely duplicative administrative proceedings are conducted by FERC and the Corps regarding the very same subject matter, at times arriving at different results, and the statutory rights created by the Federal Power Act are being denied parties such as the petitioners in this case.

These issues require addressing by this Court.

I. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE THAT RESPONDENTS' BRIEFS CANNOT DISMISS

Notwithstanding the intragovernmental conflict on the merits[1], respondents argue that certiorari should nonethe-

[1] The United States gives coequal importance to the positions of FERC and the Corps on the merits of the case. More space is devoted to explaining the position of the Corps because the reader is referred to the petition for certiorari itself for a statement of FERC's position. *See* Brief of Federal Respondents at 11 n.7. It should also be noted that the Governor of West Virginia has written the Clerk of this Court to advise that the state's "policy and position" is to support the petition

less be denied because the Commission and the Corps have executed a memorandum of understanding distributing hydropower licensing authority between them in a manner they deem congenial. Fed. Br. at 9; Intervenors Br. at 7, 10.[2] Respondents also place great emphasis on their assertion that disagreements between the agencies are uncommon. Fed. Br. at 9; Intervenors Br. at 9-10.

Respondents' assertion that the memorandum of understanding resolves as between themselves the jurisdictional problem is not relevant to the issues posed in this case. The agencies' proposal that this Court allow them to substitute an improper administrative compromise for the will of Congress is strictly forbidden. *See, e.g., Board of Governors* v. *Dimension Federal Corp.*, ___ U.S. ___, 106 S.Ct. 681, 689 (1986). Nor does the memorandum prevent future agency clashes. The memorandum gives the lead environmental role to FERC. Yet the respondents, except for FERC, denigrate FERC's environmental role, maintaining that only the Corps, and not FERC, can achieve the objectives of the FWPCA. Since the memorandum preserves the Corps' veto power over FERC licensing, it must be expected that the Corps will veto FERC licensing in future cases. And the argument completely ignores EPA, which presumably has the right to veto any agreement the Corps might enter into.

Similarly, it cannot be of assistance to respondents that disagreements between the agencies over environmental matters may not occur in great numbers.[3] As the

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for certiorari and seek reversal of the court of appeals' decision. See Appendix A.

[2] As used herein the terms "Fed. Br." and "Intervenors Br." refer to the brief in opposition filed by the federal respondents and by the intervenor organizations, respectively.

[3] Petitioners agree that FERC in discharging its environmental mandate under the Federal Power Act is unlikely to disagree often with the Corps under Section 404. Under *Udall* v. *FPC*, 387 U.S. 428 (1967),

respondents acknowledge, these two agencies so far have disagreed in regard to two major energy generation projects. Until this jurisdictional dispute is resolved they may continue to do so, dealing with the same subject matter and arriving at differing conclusions after conducting entirely duplicative proceedings. It is not possible to impute to Congress a scheme that establishes such arbitrary, inconsistent decision-making.

Respondents attempt to belittle the need for certiorari by contending that this case is of little practical moment. The petitioners see much practical moment to a situation where the Corps vetoes a license issued by FERC.[4] The question whether the Federal Power Act confers upon FERC exclusive jurisdiction over hydropower licensing goes directly to the fundamental issues of coordination, consistency, and reliability that passage of the Act was intended to settle. Resolution of the question will determine whether FERC will be entitled to exercise its express authority under Section 10(a) of the Federal Power Act to decide whether a project is, "in the judgment of the Commission," "best adapted" to the public interest.[5]

FERC is required to incorporate the national policies of the FWPCA into its determination of the "public interest." *See* Petition at 22-24.

[4] The subject of this litigation, the Davis Pumped Storage Hydroelectric Project, illustrates the need for clarification of the FERC exclusive licensing jurisdiction. The administrative law judge in the FERC proceeding, the Corps of Engineers in its separate duplicative proceeding, and FERC itself all supported a project in the Canaan Valley. J.A. 156-231, 232-284, 684-695. Both the administrative law judge and FERC noted the threat of uncontrolled development to the Canaan Valley environment and the fact that a project in the Valley could serve to achieve environmental protection. *See* J.A. at 216-17, 259. The Intervenor organizations also note (at 4) that the Canaan Valley was designated a natural landmark. The Canaan Valley would continue to qualify for such a designation if the Davis Project were to be built and, as recommended, proper land use controls were implemented. (Project No. 2709, FPC Transcript, Vol. 27, pp. 3816-25, 3834, 3858.)

[5] Whether FERC appropriately balanced the various elements is the

II. RESPONDENTS' JURISDICTIONAL ARGUMENTS CONFLICT WITH CLEAR EXPRESSIONS OF LEGISLATIVE INTENT AND THIS COURT'S CANONS OF STATUTORY INTERPRETATION

A. The Legislative History of the FWPCA Supports Exclusive FERC Hydropower Licensing Authority

Respondents' search of the legislative history of the FWPCA has yielded no evidence whatsoever that Congress intended Section 404 to apply to hydropower projects within the Commission's exclusive jurisdiction. The 1972 act deals importantly with public and private actions affecting the environment. But so does the requirement under the Federal Power Act for the painstaking environmental review under Section 10(a) that the Commission performed in its seven-year consideration of the Davis Project. *See* Petition at 5-6, 23-24. The question is not whether the FWPCA introduced a new era of environmental sensitivity, but whether in circumstances where FERC has environmental jurisdiction Congress intended to repeal such jurisdiction and give the Corps veto power over the licensing function that had been exercised exclusively by FERC for more than fifty years. There is no indication that Congress intended to establish a dual, overlapping licensing system in which the two agencies would conduct simultaneous, duplicative and potentially conflicting "public interest" reviews of the same project. Where Congress could establish or reemphasize any environmental standards for hydropower projects simply by amending the Federal Power Act—as it did, for example, in the Electric Consumers Protection Act of 1986 ("ECPA"), Pub. L. No. 99-495, 100 Stat. 1243 (1986)—the FWPCA cannot be interpreted to require duplicative administrative proceed-

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subject of a separate appeal resolution of which has been stayed pending the completion of these proceedings.

ings.[6] The requirement in Section 4(e) of the Federal Power Act of Corps of Engineers approval of the design of a dam or other structure part of a FERC-licensed project in navigable waters shows that Congress was clear in including the Corps in FERC licensing when it so chose.

B. Subsequent Congressional Actions Confirm That Congress Never Intended Section 404 to Apply to Hydropower Projects Subject to FERC Jurisdiction

Respondents' attempts to discredit Congress' reaffirmations that FERC's hydropower jurisdiction remained exclusive following passage of the FWPCA are simply not in accord with the facts. The plain language of the Conference Report which led to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977), declaring that FERC's "exclusive jurisdiction" over hydropower licensing excludes further review "by the Secretary of Energy *or any other executive branch official*," is obviously a perfectly clear reference extending beyond the Secretary of Energy. H.R. Conf. Rep. No. 539, 95th Cong., 1st Sess. 55, 75, *reprinted in* 1977 U.S. Code Cong.

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[6] The intervenor organizations' suggestions to the contrary are inaccurate. These respondents assert (Br. 13) that authority over discharge of "fill" material was given to the Corps in Section 404, showing an intention to include hydroelectric projects. The Corps has, however, historically possessed jurisdiction over "fill" materials. *See* Rivers and Harbors Act of 1899, Act of March 3, 1899, § 10, 30 Stat. 1121, 1151. Respondents also assert (Br. 13) that petitioners' description of Section 404 as preserving the Corps' former jurisdiction is inaccurate. It is not. Section 404 indeed derived from the "very simple amendment" added by Senator Ellender to preserve existing Corps authority—authority that did not then extend to Commission-licensed projects. *See* Petition at 15-16. The Ellender amendment was in turn modified by an alternative proposed by Senator Muskie (and accepted by Senator Ellender) which just gave EPA veto power over Corps determinations. 117 Cong. Rec. S38854-57 (1971). After the passage of Section 404 in 1972 the Corps interpreted Section 404 as not applying to Commission-licensed projects, *see* Petition at 16, and FERC, through interpretation of its own organic statute, continues to hold that view.

& Admin. News 925, 946 (emphasis added.) The Corps' bald assertion to the contrary is simply inconsistent with this plan meaning. *See* Fed. Br. at 16 n.12, *see also* Intervenors Br. at 17-18.

Respondents similarly fail to discredit ECPA, *supra*, in which Congress amended the Federal Power Act, not Section 404, to reemphasize the environmental considerations that must be addressed by FERC in a hydropower licensing. If Congress indeed shared respondents' view that such environmental protection was entrusted to the Corps, then Congress would have expressed its intentions through an amendment to the FWPCA. It is settled that such views of later Congresses about prior legislation "have persuasive value." *Bell* v. *New Jersey*, 461 U.S. 773, 784 (1983). *Cf. St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 786 (1981) (later congressional indication "too general and too ambiguous" to alter meaning of prior legislation).

C. Respondents' "Reconciliation" of the FWPCA and the Federal Power Act Violates this Court's Fundamental Tenets of Statutory Construction

Respondents' jurisdictional argument is based upon the undisputed truism that the 1920 Federal Power Act did not prospectively preempt all subsequent legislation. *See* Fed. Br. at 15; Intervenors' Br. at 15-16. That is not the issue. Rather, the significant question to be answered (and which can only be answered definitively by this Court) is whether comprehensive legislative enactments like the Federal Power Act are to be accorded proper deference and protection, or can be amended and even repealed by court interpretation of vague and imprecise language in later statutes. As this Court stated in *Train* v. *Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 24 (1976), comprehensive statutory schemes may only be disturbed by subsequent legislation if there is a "clear indication of

legislative intent" to do so.[7] Respondents would ignore this stricture, finding an implied modification of an existing statutory structure even where there is no such "clear indication."[8]

Respondents (except for FERC) repeat the error of the court of appeals by construing the statutory schemes in a manner that impermissibly, and needlessly, trespasses on the Federal Power Act. Under Section 10(a) of the Act a license issues if "in the judgment of the Commission" the project is "best adapted" to the public interest. *See Udall* v. *Federal Power Commission*, 387 U.S. 428, 450 (1967). Insertion of the Corps' veto power into the licensing process reads out of Section 10(a) the judgment of the Commission and frustrates the critical purpose of the Federal

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[7] Such is the case with the statute construed in *Appalachian Power Co.* v. *United States*, 607 F.2d 935 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 935 (1980), which by its own terms is specifically applicable to hydropower projects. *Id.* at 941.

[8] The Corps of Engineers suggests that *Train* is merely a vehicle for giving effect to an agency's interpretation of a statute it administers. Fed. Br. at 14-15 n.11. This tortured construction is wholly at odds with the Court's opinion, which expressly states that EPA's interpretation of the statute was *not* relied upon. 426 U.S. at 8 n.8. Moreover, it rather pointedly ignores FERC's interpretation of its own organic statute.

Indeed, the Corps' interpretation of its obligations has been far from consistent. As stated in the petition, the Corps' regulations did not apply to the Davis Project until 1977. *See* Petition at 7. Respondents' assertion that petitioners are in error stems from their misreading of the petition to refer to Corps jurisdiction over hydroelectric projects generally. *See* Fed. Br. at 9; Intervenors Br. at 9. Although that general action was taken in regulations that became final in 1975, it was not until July 1, 1977 that the Corps, under court order in *NRDC* v. *Callaway*, 392 F.Supp. 685 (D.D.C. 1975), implemented an expanded definition of "navigable waters" that for the first time embraced the site of the Davis Project. *See* 40 Fed. Reg. 31326 (1975). The Corps of Engineers decision in this case itself so states: "[U]nder the three-phased implementation of Corps regulatory jurisdiction, regulation of the Blackwater River became effective 1 July 1977." J.A. 685.

Power Act to centralize hydropower licensing in one agency so that a coherent vision of the public interest can be implemented. *See* Petition at 12, A-8; Intervenors Br. at 16. While "other federal environmental, health, safety, or welfare statutory requirements" may happily coexist with the Commission's broad responsibilities, Fed. Br. at 16, this one clearly can not.

III. RESPONDENTS MISCONSTRUE THE ENVIRONMENTAL OBLIGATIONS OF BOTH FERC AND THE CORPS

Respondents and the court of appeals erroneously portray the FERC and Corps' environmental responsibilities as markedly different—FERC to do a balancing of interests and the Corps to effect sharply defined criteria—giving the mistaken impression that the Corps' participation in hydropower licensing decisions is necessary to protect the public interest. *See* Fed. Br. at 17-19; Intervenors Br. at 22. That is not so, and is not consistent with the Corps' own description of its responsibility in this very case.[9] Both agencies must examine all factors, environmental and otherwise. FERC has an obligation to implement environmental values, Petition at 22-25, just as the Corps has an obligation in Section 404 proceedings to "give great weight to energy needs as a factor in the public interest review and . . . give high priority to permit actions involving energy projects." 33 C.F.R. § 320.4(n).

Respondents also attempt to avoid the court of appeals'

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[9] The Corps stated that in arriving at its conclusion on the Davis Project "a careful balance must be reached between the ever increasing demands for additional power, the lifeblood of economic health, and the progress necessary to encourage a growing population, on one hand, and on the other, the preservation, conservation and protection of ecological and other resources having significant human value. All are essential." J.A. 694.

virtual dismissal of FERC's environmental obligations. Fed. Br. at 8-9; Intervenors Br. at 21. But the court of appeals' own language, addressed by neither brief in opposition, asserts clearly that neither FERC's statutory nor regulatory obligations impose any real substantive environmental responsibilities upon the agency.[10] This is a stunning departure from settled law. Given the national priority on the environment, FERC's environmental obligation is an important continuing question needing resolution by this Court.

IV. CONCLUSION

The petition for certiorari should be granted.

July 29, 1987 Respectfully submitted,

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[10] The court of appeals grudgingly acknowledges "the mere existence of an implied general obligation on FERC's part to consider conservation factors," Petition at A-24, but states that this statutory obligation does not "create[] a format for decision-making, the absence of which is the crux of the present problem." *Id.* Similarly, the court of appeals dismisses FERC's environmental regulations as "unchanneled, precatory invitations for information" that are specifically distinguished from the "rigorous study demanded of the Corps." *Id.* The "critical difference" between the environmental review performed by the Commission and the Corps, according to the court of appeals, is that the Commission's regulations do not establish "standards governing decisions," "impose[] no direct restraints on FPC's deliberations or determinations," provide inadequate "assistance in its [environmental] review," and do not set forth goals "in any wise analogous" to those of the Corps. *Id.* at A-23

APPENDIX

APPENDIX A

STATE OF WEST VIRGINIA
OFFICE OF THE GOVERNOR
CHARLESTON 25305

[SEAL]

Arch A. Moore, Jr.
Governor

June 12, 1987

Honorable Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Monongahela Power Company, et al. v. Marsh, et al., No. 86-1642

Dear Mr. Spaniol:

Please inform the Court that the State of West Virginia will not file a brief in opposition to the pending petition for certiorari in the above-referenced case. It is the policy and position of the State of West Virginia that the petition for certiorari should be granted.

Previous appearances in this case by the Attorney General of West Virginia, an elective office created by the Constitution of West Virginia, have reflected the views of the Attorneys General, and do not represent the position of the State of West Virginia. If your dockets and court records indicate that the State of West Virginia is a party to this action, they are inaccurate, and should be corrected to refer to the Attorney General as the party litigant.

Sincerely,

/s/

Arch A. Moore, Jr.
Governor

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